No. 85830

IN THE
MISSOURI SUPREME COURT

ANDRE V. COLE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of St. Louis County, Missouri
21st Judicial Circuit, Division 9
The Honorable David Lee Vincent, III, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the denial of appellant's Rule 29.15 motion, obtained in the Circuit Court of St. Louis County, the Honorable David Lee Vincent, III, presiding. In that motion, appellant sought to vacate convictions for murder in the first degree, § 565.020, RSMo 2000, assault in the first degree, § 565.050, RSMo 2000, burglary in the first degree, § 569.160, RSMo 2000, and two counts of armed criminal action, § 571.015, RSMo 2000. Because appellant was sentenced to death for the offense of murder in the first degree, this Court has jurisdiction. Article V, § 3, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Andre V. Cole, was convicted of murder in the first degree, § 565.020, RSMo 2000, assault in the first degree, § 565.050, RSMo 2000, burglary in the first degree, § 569.160, RSMo 2000, and two counts of armed criminal action, § 571.015, RSMo 2000. *State v. Cole*, 71 S.W.3d 163, 168 (Mo. banc 2002). This Court summarized the facts of appellant's crimes as follows:

> Appellant and his wife, Terri Cole (Terri), divorced in 1995 after eleven years of marriage. Appellant was ordered to pay child support for the care of the couple's two children but his periodic failure to make payments resulted in an arrearage totaling nearly $3000.00. Upon learning that a payroll withholding order was issued to his employer, Appellant commented to his coworkers, "Before I give her another dime I'll kill the bitch."
>
> The first payroll deduction for child support appeared on Appellant's August 21, 1998 paycheck, and several hours later Appellant forced his entry into Terri's house by throwing an automobile jack through the glass door leading to the dining room. Anthony Curtis (Curtis), who was visiting Terri, confronted Appellant and asked him to leave. Appellant stabbed Curtis multiple times resulting in his death. Appellant then assaulted Terri, stabbing her repeatedly in the stomach, breasts, back, and arms, and her hands when she attempted to defend herself. Terri survived.
>
> After the attack, Appellant fled the State, but he returned to St. Louis and

> surrendered to the police thirty-three days later. DNA analysis confirmed the presence of both victims' blood on the knife and the presence of Appellant's blood on the deck of Terri's home, the backyard fence, and in the street where Appellant's car had been parked.

State v. Cole, 71 S.W.3d at 168-169.

Appellant was sentenced to death for the murder, three terms of life imprisonment for the assault and two counts of armed criminal action, and thirty years for the burglary. *Id*. at 168. This Court affirmed appellant's convictions and sentences on February 26, 2002, *id*., and issued its mandate on April 23, 2002.

On July 22, 2002, appellant timely filed his *pro se* motion for post-conviction relief (PCR L.F. 1, 6-11). Then, on October 20, 2002, counsel filed an amended motion to vacate, set aside, or correct judgment and sentence (PCR L.F. 17-442).

On April 30, 2003, the motion court granted an evidentiary hearing on eight of appellant's claims – claims 8(A), 8(B), 8(C), 8(D), 8(G), 8(H), 8(J), and 8(K) (PCR L.F. 444-445). The motion court denied the request for an evidentiary hearing on appellant's other twelve claims (PCR L.F. 445).

An evidentiary hearing was held November 24-26, 2003 (PCR Tr. 2, 270; PCR Tr.II 2). And, on December 29, 2003, the motion court issued findings of fact and conclusions of law denying appellant's post-conviction motion (PCR L.F. 450-486). This appeal followed.

ARGUMENT

I.

The motion court did not clearly err in denying, after an evidentiary hearing, appellant's claim that counsel was ineffective for failing to object to various comments in guilt- and penalty-phase closing argument.

Appellant contends that the motion court clearly erred in denying his claim that counsel was ineffective for failing to object to various comments made by the prosecutor in guilt- and penalty-phase closing arguments (App.Br. 26).

A. The Standard of Review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 508, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id*. "The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Supreme Court Rule 29.15(i).

B. Guilt-Phase Closing Argument

To prevail on a claim of ineffective assistance of counsel, appellant must "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984). Appellant must also show prejudice – that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

"The attorney's conduct must be so egregious that it undermines the proper functioning of the adversarial process to such an extent that the original trial cannot be relied on as producing a just result." *Clayton v. State*, 63 S.W.3d 201, 206 (Mo. banc 2001). If the appellant fails to show either deficient performance or prejudice, the court need not address the other component. *State v. Allen*, 954 S.W.2d 414, 417 (Mo.App. E.D. 1997).

1. This Court has already determined that there was either "no error" or "no prejudice" from the prosecutor's guilt-phase closing arguments

Appellant claims that counsel was ineffective for failing to object to four comments made by the prosecutor in guilt-phase closing and rebuttal arguments (App.Br. 26). The arguments in question are:

(1) "I can't think of a case that could be more important,"

(2) "he's a convicted killer,"

(3) "People sitting in that chair . . . are usually there for a reason," and

(4) "Don't tell Terry Cole, a dying woman, . . . that she is a liar"

Each of these arguments was challenged on direct appeal and examined for plain error. *State v. Cole*, 71 S.W.3d 163, 169-171 (Mo. banc 2002). As to the first, third, and fourth arguments listed here, this Court found that there was "no error." *Id*. at 170 n. 9. As to the second argument listed here, this Court found that it was erroneous but "not prejudici[al]." *Id*. at 170-171.

Because this Court has already found "no error" with regard to the first, third, and fourth arguments, this claim as to those arguments is wholly without merit. *See Ringo v. State*, 120 S.W.3d 743, 746 (Mo. banc 2003) (where this Court found "no error" on direct appeal, the defendant could not raise the claim in a post-conviction motion). Additionally, because this Court has already determined that the second argument was not prejudicial, appellant's claim as to that argument is also without merit.

As stated above, in reviewing for plain error on direct appeal, this Court examined the prejudicial effect of the second argument and concluded that appellant was not prejudiced; this Court stated:

> The misstatement by the prosecutor **referring to the Appellant as a "convicted killer" was a single inadvertent remark not prejudicing Appellant** because the jury had already been presented with the precise nature of his actual prior convictions, none of which involved a homicide.

State v. Cole, 71 S.W.3d at 170-171 (emphasis added). Because there was "no prejudice" on direct appeal, there can be no prejudice here.

Admittedly, as appellant points out in his brief (App.Br. 28), a finding of "no manifest injustice" under plain-error analysis is not the equivalent of finding of "no prejudice" under the *Strickland* test. As this Court has explained: "while, under Missouri law, plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative, *Strickland* clearly and explicitly holds that an outcome-determinative test cannot be applied in a post-conviction setting." *Deck v. State*, 68 S.W.3d 418, 427 (Mo. banc

2002) (citation omitted).

However, in deciding *Deck*, this Court also observed that the difference between the two standards of review is minimal; this Court stated:

> Of course, as *Strickland* recognized, this theoretical difference in the two standards of review will seldom cause a court to grant post-conviction relief after it has denied relief on direct appeal, for, in most cases, an error that is not outcome-determinative on direct appeal will also fail to meet the *Strickland* test.

Id. at 428. Consequently, there is only a "limited range of cases in which plain error did not exist, but *Strickland* prejudice is present." *Id*. And this is not one of those cases.

In *Shifkowski v. State*, 136 S.W.3d 588 (Mo.App. S.D. 2004), the Court of Appeals examined the impact of *Deck* upon post-conviction claims that had been previously reviewed for plain error on direct appeal. Citing various examples, the Court of Appeals pointed out that plain-error claims can be disposed of in one of five ways on direct appeal: (1) the reviewing court may simply decline to exercise its discretionary authority to review the point for plain error; (2) the court may conduct plain error review and conclude that no error occurred at all, (3) the court may conduct plain error review and conclude that an error occurred, but it was harmless and caused no prejudice to the appellant, (4) the court may conduct plain error review and conclude that a prejudicial error occurred, but deny relief because the prejudice to appellant does not rise to the level of a manifest injustice or miscarriage of justice; or (5) the court may conduct plain error review and grant relief because the error caused a manifest

injustice or miscarriage of justice to occur. *Id*. at 590-591.

The disposition on direct appeal is important because if the reviewing court on direct appeal found "no error" (the second category identified in *Shifkowski*), then there was no meritorious basis for counsel to object, and there is no possibility that counsel was ineffective for failing to object. *Ringo v. State*, 120 S.W.3d at 746; *Shifkowski v. State*, 136 S.W.3d at 591. In other words, under such circumstances, the alleged error cannot be relitigated (or at least *successfully* relitigated) in the post-conviction context.

Similarly, if the reviewing court on direct appeal concluded that there was error but that the defendant was not "prejudiced" by the error (the third category identified in *Shifkowski*), then, while there may have been a meritorious basis for counsel to object (assuming that there was no strategic reason to withhold objection), there is no possibility that the defendant was prejudiced by counsel's failing to object. "Prejudice" on direct appeal is less than "manifest injustice," and it cannot be reasonably distinguished from *Strickland* prejudice (which is, as this Court held in *Deck*, also something less than manifest injustice). Accordingly, where, as in the case at bar, a plain-error claim is disposed of on direct appeal as not "prejudicial," the claim cannot be relitigated as a claim of ineffective assistance of counsel.[1]

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[1] The small category of cases that can be relitigated are those that fall into the fourth category identified by *Shifkowski* – claims where error occurred but where the prejudice did not rise to the level of manifest injustice. But even then each case must be examined to determine whether the defendant was prejudiced under *Strickland*.

In any event, even if this Court disregards its previous holdings and elects to re-examine the arguments that were challenged on direct appeal, the motion court did not clearly err. Respondent will address each argument as set forth in appellant's brief.

2. "I can't think of a case that could be more important"

Appellant first argues that counsel was ineffective for failing to object to comments made by the prosecutor during the opening remarks of closing argument. The prosecutor stated:

> If I might have the Court's instructions, your Honor. May it please the Court, Ms. Hirzy, ladies and gentlemen of the jury, I want to thank you for your time because this is one January 15th of 2001 and you're spending it here with us and just like you spent the last week you are giving us a most valuable asset, however, **I can't think of a case that could be more important to the people of St. Louis County** and to the family of Anthony Curtis and to the family of Terri Cole and Terri Cole herself and the case that you've heard here over the last week. As you reflect back on the evidence and you think about the evidence that you heard in this case, I can't emphasize enough to you the seriousness of this case nor can I emphasize enough to you the strength of the State's case.

(Tr. 1415) (emphasis added).

Relying on *State v. Storey*, 901 S.W.2d 886, 900-901 (Mo. banc 1995), appellant argues that the prosecutor argued matters not in the record (App.Br. 30). He claims that the prosecutor argued that his case was "the single most important case in the county" (App.Br.

30). In *Storey*, this Court condemned, *inter alia*, the prosecutor's arguing, in penalty phase, that Storey's murder was "the most brutal slaying in the history of this county." *Id*. at 900.

In the case at bar, in denying appellant's claim, the motion court stated:

> Movant's second complaint concerning closing argument asserts the State committed error akin to that found in State v. Story, 901 S.W.2d 886 (Mo. banc 1995). In the first few moments of his closing argument, the State begins to thank the jury for the time they have spent hearing this case. The entire quote reads as follows:
>
> [the argument is quoted]
>
> A reasonable reading of this passage reflects the prosecutor's attempt to convey to the jury his appreciation for the time they have spent away from their families and everyday lives hearing this case. Contrary to Movant's assertion, these statement do not suggest to the jury that there exists reasons outside of the record for this prosecution, rather it expresses to the jury that they have an important job before them and that their time as jurors is an important component to the justice system in St. Louis County. These statements are quickly followed by a discussion about the strength of the evidence in the case.
>
> Trial counsel testified that this argument is commonly made by prosecutor's [sic] and that she does not find the argument objectionable. Counsel stated that she was very familiar with the Storey decision and believes this remark was very different from the arguments in that case. From a reading

> of counsel's opening and closing arguments in this case it is clear that she emphasized the importance of this case to her client and his family as well. An objection to this remark by trial counsel would have been without merit. The Missouri Supreme Court found no error concerning these remarks. Cole at 170, note 9. This claim is denied.

(PCR L.F. 455-456). The motion court did not clearly err.

At the evidentiary hearing, counsel testified that she did not object to the prosecutor's introductory remark because it was the kind of argument that is commonly made, it was not objectionable, and it did not refer to facts not in evidence (PCR Tr. 336-338). Counsel also pointed out that the argument in the case at bar was different from the argument made in *Storey*, particularly because of the manner in which the arguments were presented to the jury (PCR Tr. 343-344). Counsel was correct, and her performance did not fall below an objective standard of reasonableness.

As is evident from the context of the argument, the prosecutor's comment was designed to thank the jurors for their service and assure the jurors that their time – "a most valuable asset" – had been well spent during the several days of trial. Additionally, contrary to appellant's assertion, the prosecutor *did not* argue that appellant's case was the "single most important case in the county;" rather, the prosecutor merely observed that he could not "think of a case that could be more important to the people of St. Louis County" (Tr. 1415).

The difference between asserting that a case is the single most important case (or the "most brutal" as in *Storey*) and observing that one cannot think of a more important case is

significant. The former implies that the prosecutor has specific knowledge of all other cases, and that the present case is more important or more brutal than all of them. The latter merely reveals that the prosecutor cannot think of a case that is more important.[2] And, even apart from the obvious significance of this case to the victims and their survivors (and to appellant), it is virtually indisputable that no prosecution can be more important to the citizens of a community that one in which the state seeks the death penalty.

Additionally, unlike the remark during the penalty phase in *Storey*, which told the jurors that there had never been a more "brutal" case in the history of the county, the prosecutor here only remarked upon the *importance* of the case – a fact that had no bearing upon the determination of appellant's guilt (or, incidentally, the propriety of imposing the death

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[2] For this reason, among others, appellant's reliance upon *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989); and *Copeland v. Washington*, 232 F.3d 969 (8th Cir. 2000), is misplaced. In *Newlon v. Armontrout*, for example, the prosecutor said, "I've been a prosecutor for ten years and I've never asked a jury for a death penalty, but I can tell you in all candor, I've never seen a man who deserved it more than Rayfield Newlon" and "I say to you that I never saw a man who deserved it more and I say that to you in complete sincerity, and it's my job, as I see it, to tell you that." *Newlon v. Armontrout*, 885 F.2d at 1339-1340. Similarly, in *Copeland v. Washington*, the prosecutor said that "there has never, ever been a more complete and utter disregard for the sanctity of human life as this case." *Copeland v. Washington*, 232 F.3d at 972.

sentence). *See State v. Christeson*, 50 S.W.2d 251, 270 (Mo. banc 2001) (not improper for the prosecutor to argue, "Again, I tell you, this is the worst case in our society the worst crime in our society, murder in the first degree."). *Compare State v. Storey*, 901 S.W.2d at 900; *State v. Roberts*, 948 S.W.2d 577, 594 (Mo. banc 1997) (the prosecutor said, "This is as brutal a murder as ever occurred in St. Louis County."). Indeed, the importance of the case was merely a natural (and self-evident) consequence of the nature of the case.[3] *See State v. Christeson*, 50 S.W.3d at 270. There is no probability that the jury understood this comment to suggest that the prosecutor had secret knowledge of outside facts showing deliberation, and appellant's assertion along those lines (App.Br. 45) is merely unsupported speculation.

In short, when viewed in context, the prosecutor's statement did not imply special knowledge of facts outside the record; rather, it was merely a rhetorical statement designed to thank the jurors for their service, assure them of the value of their service, and emphasize the great responsibility they bore as citizens.[4] The remark was entirely proper in light of nature and seriousness of the crime and potential punishment. *See generally Bucklew v. State*, 38 S.W.3d 395, 400 (Mo. banc 2001) (because the comments were rhetorical and based on the

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[3] Even defense counsel recognized the supreme importance of this case when she argued, "The stakes are as high as they get, they don't get any higher" (Tr. 1465).

[4] It is somewhat ironic that appellant relies upon *Antwine v. Delo*, 54 F.3d 1357, 1364 (8th Cir. 1995), because in that case the prosecutor *diminished* the jurors' sense of responsibility by arguing facts outside the record, e.g., that execution in a gas chamber would be instantaneous.

evidence, counsel was not ineffective for failing to object to "Ladies and gentlemen, if this crime does not deserve the death penalty, then what would? Who deserves the death penalty if not this sociopathic killer?"). Thus, as this Court held on direct appeal, there was "no error" in allowing the prosecutor to make this argument, *State v. Cole*, 71 S.W.3d at 170 n. 9; and, consequently, counsel was not ineffective for failing to make a non-meritorious objection. *Ringo v. State*, 120 S.W.3d at 746 (where this Court found "no error" on direct appeal, the defendant could not raise the claim in a post-conviction motion). The motion court did not clearly err as to this claim.

2. "he's a convicted killer"

Appellant next contends that counsel was ineffective for failing to object to the emphasized language from the following argument made during the state's rebuttal:

> Do not forget that he lied when you look at this. Don't think somebody who killed wouldn't come in and lie. I'm going to ask you to think about two words have collided. Anthony Curtis, a tour guide from the museum. You can take that picture of Terri Cole. It shows her after the attack. She's Marcus' mom. She's Anthony's mom. She's a mom who worked for a health company doing clerical work and **he's a convicted killer**.

(Tr. 1478) (emphasis added). Appellant points out that there was no evidence that he had a prior murder conviction, and he argues that this was a misstatement of fact that resulted in prejudice (App.Br. 32-34).

In denying this claim, the motion court stated:

Initially, Movant reasserts the complaint raised on direct appeal concerning the following statement by the prosecutor, "She's a mom who worked for a health company doing clerical work and he's a convicted killer." (Tr. 1478). In considering this claim for plain error review, the Missouri Supreme Court concluded:

> "The prosecutor's statements referencing appellant's prior convictions were properly admitted to attack Appellant's credibility. The **misstatement** by the prosecutor referring to the Appellant as a 'convicted killer' was a **single inadvertent remark not prejudicing Appellant** because the jury had already been presented with the precise nature of his actual prior convictions none of which involved a homicide. . . . the fact that the absence of an objection by trial counsel may have been strategic in nature. Cole at 171 [Emphasis added].

Examination of this isolated remark in the context of the last few moments of the State's rebuttal argument reflects the prosecutor's efforts to contrast the credibility of the witnesses, not an attempt to infer that a prior murder had been committed by the defendant. Movant's extensive direct and cross-examinations clearly demonstrated that he did not have prior murder conviction.

Trial counsel testified at the evidentiary hearing and indicated that she did not recall the remark most likely due to Movant talking to her during the

> argument. Trial counsel indicated that had she heard the remark she may or may not have objected to it.[5] The prosecutor's remark is clearly inadvertent and this Court agrees with the Supreme Court in finding no prejudice to Movant. Cole at 170-171. This claim is dismissed.

(PCR L.F. 454-455). The motion court did not clearly err.

At the evidentiary hearing, inasmuch as appellant had no prior conviction for murder, counsel agreed that it was objectionable to refer to appellant as a "convicted killer" (PCR Tr. 328-330). She explained, however, that she had not heard the prosecutor make that particular statement (PCR Tr. 329-330, 479). She surmised that she must not have heard the statement due to appellant's talking to her during closing argument (PCR Tr. 330, 479). She further opined that she thought "the jury would be capable of knowing that he wasn't convicted yet," inasmuch as the jury was there to determine appellant's guilt (PCR Tr. 330).

While the motion court focused on the lack of prejudice flowing from counsel's failing to object (PCR L.F. 455), it is also apparent that counsel's overall performance did not fall below an objective standard of reasonableness. A lack of objection flowing from simple inattention, ignorance, or negligence would probably support a finding that counsel's performance fell below an objective standard of reasonableness. Here, however, it appears that counsel missed this comment due to appellant's diverting her attention away from the

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[5] Appellant correctly points out that counsel testified that she would have objected to this remark if she had heard it (PCR Tr. 330).

proceedings. And inasmuch as counsel *should* communicate with her client and garner his input, such an isolated moment of inattention caused by the inevitable pressures of balancing various duties is not sufficient to prove that counsel's overall performance fell below an objective standard of reasonableness.

In any event, the motion court did not clearly err, because it is evident that appellant suffered no prejudice from this comment. As this Court noted on direct appeal, *State v. Cole*, 71 S.W.3d at 171, the jurors were well aware of appellant's prior convictions, and they knew that appellant had not been previously convicted of murder. The jurors were also specifically instructed that closing arguments were not evidence (L.F. 164).

It must be assumed that the jurors "reasonably, conscientiously, and impartially appl[ied] the standards that govern[ed] the decision," *Strickland v. Washington*, 466 U.S. at 695. Consequently, there is no reasonable probability that the jury misunderstood the prosecutor's statement and concluded that appellant, in fact, had been previously convicted of murder. Indeed, it is far more probable that the jury heard this argument for what it was intended to convey: that appellant, who was a "convicted felon" (Tr. 1477), and who was "somebody who killed" (Tr. 1478), lacked credibility. The prosecutor did not "fan[] the fire of the jurors' emotions" (App.Br. 42) with this inartful remark, and it is simply unsupported speculation to suggest that the jury was "riled up" by this slip of the tongue. Thus, aside from prompting the prosecutor to rephrase his closing argument, an objection would have had no effect upon the outcome of appellant's case. The motion court did not clearly err.

3. "People sitting in that chair . . . are usually there for a reason"

Appellant next contends that counsel was ineffective for failing to object, during the state's rebuttal argument, to the following:

> What we do know is his actions are deliberate. When she says it's ludicrous, maybe it is to you and me. To him it's deliberate. He's not an imbecile but he's not a rocket scientist. **People sitting in that chair (indicating), ladies and gentlemen, are usually there for a reason.** They may not be a rocket scientist, they are deliberate and calculating and do the best they can with the mayhem they create. That's why I tell you about him when Ms. Hirzy tells you why isn't she dead, why isn't she dead? When he threw that through the window and he went in there and he took these steps towards Anthony Curtis, he had to spend time attacking Anthony Curtis. I'll tell you the other thing. When he left her, remember that alarm is going off when he left her, she was on the ground gasping for air. He knew the clock was ticking and he did his best.

(Tr. 1474). Appellant claims that the emphasized argument "denigrated the presumption of innocence and implied to the jury that the prosecutor had knowledge of Cole's guilt beyond the facts in evidence" (App.Br. 35).

In denying this claim, the motion court stated:

> Movant next asserts the State attacked his right to be presumed innocent. The State's retaliatory argument in context reads:
>
> [the argument is quoted]

> When read in context, the State's retaliatory argument as noted by trial counsel, was proper and any objection would have been without merit. The State addressed Movant's intelligence and ability to commit this crime, not the presumption of innocence. The Missouri Supreme court reviewed this remark and found no error of law. Cole at 170, note 9. This claim is denied.

(PCR L.F. 458). The motion court did not clearly err.

At the evidentiary hearing, defense counsel testified that she had provoked the prosecutor's comment (that the prosecutor's comment was retaliatory), that she did not think the prosecutor's argument was objectionable, and that she did not think that the argument went against the presumption of innocence (PCR Tr. 349-350). Defense counsel was correct on all counts.

As the record shows, it was defense counsel who repeatedly argued that the state was relying upon the fact that appellant was charged with the crime to prove appellant's guilt (Tr. 1450-1451, 1457, 1465). In particular, defense counsel argued as follows:

> All right. So we go back now to my client, who is a sneak. He's not stupid. He doesn't have to testify. We went into his priors on voir dire. He could have chosen not to say a word. He didn't have to tell his side of the story. He didn't, and nobody could say anything about that. We talked about that on voir dire too, but he took the stand and he told you his side of the story. Now, **the State wants you to think it's ludicrous because he's been charged, he's therefore guilty.**

[THE PROSECUTOR]: Object to that, your Honor. I have never said that. That misstates the law, misstates what I told the jury during the entire jury selection in the case.

THE COURT: Rephrase it. I'll sustain that.

MS. HIRZY: He's charged because the witnesses come in here and they say this.

* * *

That's what my client told you. Of course, it's not worth believing because he's been charged with the case and their witnesses said he did it.

Reasonable doubt? Reasonable doubt? **One version is just as believable as the other version is equally believable. If you take away the fact that he is charged and on trial, but I'll tell you this much, if he didn't take it, there would be somebody else sitting at that table** and it wouldn't have been Anthony Curtis, it would have been Terri.

* * *

Please take all that stuff back there and talk about it, listen to each other's opinion, **just don't discount him because he's got convictions and he's charged.**

(Tr. 1450-1451, 1457, 1465).

As is evident, one of the themes of defense counsel's closing argument was that the state was relying upon the fact that appellant was charged with the crime to prove his guilt. But

that simply was not true, as evidenced by the state's repeated and consistent references to the *evidence* supporting appellant's guilt (*see* Tr. 1415-1437). Thus, it is not surprising that defense counsel's misleading (and legally incorrect) comments elicited a response from the prosecutor, who merely explained that people were usually charged "for a reason."

"A prosecutor has considerable leeway to make retaliatory arguments in closing." *State v. Roll*, 942 S.W.2d 370, 378 (Mo. banc 1997). "A defendant may not provoke a reply and then assert error." *Id*. Accordingly, as this Court stated on direct appeal, there was "no error" arising from the prosecutor's comment, *State v. Cole*, 71 S.W.3d at 170 n. 9, and there was no meritorious basis for counsel to object. *See Ringo v. State*, 120 S.W.3d at 746 (where this Court found "no error" on direct appeal, the defendant could not raise the claim in a post-conviction motion).

Additionally, there is no possibility of prejudice from the prosecutor's comment. First, the record shows that the jury was specifically instructed that a charge was not evidence of guilt (L.F. 152). Second, the prosecutor did not imply that there was some undisclosed "reason" that appellant was charged with the crimes. To the contrary, the prosecutor was telling the jury that people frequently become criminal defendants because they are not as smart or as skillful as they thought they were in committing their crimes.[6] The prosecutor in no way

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[6] Incidentally, defense counsel had repeatedly suggested that appellant was an "intelligent" person and would not have been "stupid" enough to commit the crime as posited by the state's evidence (Tr. 1443, 1450).

suggested that he had "knowledge of [appellant's] guilt beyond the facts in evidence" (App.Br. 35). Thus, there is no probability that the jury understood this comment to suggest that the prosecutor had secret knowledge of outside facts showing deliberation, and appellant's assertion along those lines (App.Br. 45) is merely unsupported speculation.

Appellant also argues that the prosecutor's comment was akin to arguments made in *United States v. Splain*, 545 F.2d 1131 (8th Cir. 1976); *State v. Evans*, 820 S.W.2d 545 (Mo.App. E.D. 1992); *State v. Jones*, 835 S.W.2d 376 (Mo.App. E.D. 1992); and *State v. Ross*, 667 S.W.2d 31 (Mo.App. E.D. 1984). But all of these cases are plainly distinguishable. In *United States v. Splain*, for example, the prosecutor stated that the defendant was on trial "because he committed a crime and we are convinced of that **or we wouldn't be trying him.**" *United States v. Splain*, 545 F.2d at 1134 (emphasis added). The prosecutor also informed the jury that "the U. S. Attorney's Office doesn't file a case unless they really feel that there is [sic] a man has committed a crime." *Id*.

The problem with this type of argument is that it seeks to convince the jury to convict based upon an assurance of good faith from the prosecutor that the prosecutorial system will not bring an innocent person to trial. *See also State v. Jones*, 835 S.W.2d at 378 (the prosecutor argued "If I believed somebody is not guilty I'm under a sworn obligation not to . . .If I feel there is any doubt that this man is not guilty I will not prosecute this case. I've got too many cases. There is no need for me to prosecute a case where I absolutely am certain the guy is not guilty, and I won't go into court unless I'm certain the guy is guilty."); *State v. Evans*, 820 S.W.2d at 547 (the prosecutor argued, "If this man were innocent I wouldn't bring a charge

. . . I wouldn't try this case.").[7]

But, there was no such argument in the case at bar. Indeed, to the extent that the prosecutor may have implied that appellant was "sitting in that chair" because he was guilty, e.g., because he was "deliberate and calculating," the prosecutor's argument was premised upon the evidence presented at trial (*see* Tr. 1474). And that was entirely proper. *See State v. Taylor*, 944 S.W.2d 925, 936 (Mo. banc 1997) ("A prosecutor may state personal opinions on matters, including guilt, where they are fairly based on the evidence.").

In short, at no time did the prosecutor refer to facts outside the record or assure the jury that he would not have charged an innocent person. The motion court did not clearly err as to this claim.

4. "Don't tell Terry Cole, a dying woman, . . . that she is a liar"

Lastly, as to guilt-phase closing argument, appellant argues that counsel was ineffective for failing to object to the following: "Don't tell Terri Cole, a dying woman, by your verdict that she is a liar" (App.Br. 39). Appellant argues that referring to Terri Cole as "a dying woman" was prejudicial because it was an inflammatory, emotional appeal (App.Br. 40-42).

In denying this claim, the motion court stated:

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[7] Appellant's reliance upon *State v. Ross* is equally misplaced. In that case the prosecutor essentially made the court a witness for the state by assuring the jury that the identification evidence had been judicially sanctioned by its admission into evidence. *State v. Ross*, 667 S.W.2d at 33.

Movant's fifth claim of argument error is found in the following passage, "Don't tell Terri Cole, a dying woman, by your verdict that she is a liar." Trial counsel testified at this hearing that she believed the argument to be a proper retaliatory argument concerning the assault victim Terri Cole. The transcript is clear that both the State and defense elicited testimony from Ms. Cole concerning her medical condition and the fact her disease had no relationship to the case or her ex-husband. Trial counsel recalled that the jury never saw Terri Cole in a wheelchair as she was placed on the witness stand when the jurors were out of the courtroom.

Movant's claim that the prosecutor's statement was made to garner sympathy ignores the closing argument by trial counsel attacking Ms. Cole's credibility. Trial counsel argued that Terri Cole lied, she was only interested in money from defendant, that she hated defendant, that she wanted him to die, that she doesn't care what she has to say to make him die, that she turned Movant's kids against him, and that it was impossible for her to effectively cross-examine her because of her illness. (Tr. 1442-1446). This witness gave consistent statements throughout this entire case. She was cross-examined about her initial statements to police, statements to hospital personnel, taped statements, two (2) depositions and previous motion testimony. Despite the consistency of her testimony, she was still attacked in closing by the defense attorney as a liar.

The State is allowed to reply to an argument provoked by the defendant.

> Common sense and the law both give credibility to statements made by dying individuals. In this case, the State merely pointed out to the jury another reason for the witness to tell the truth. The State's argument points out another reason to disbelieve the defense claims of bias. The Missouri Supreme Corut reviewed this argument and found no error. Cole at 170, note 9. Any objection would have been without merit and this point is denied.

(PCR L.F. 459-460). The motion court did not clearly err.

At the evidentiary hearing, defense counsel stated that she did not object to the comment in question for two reasons: (1) because she did not want to appear "cold hearted;" and (2) because she had, during the course of the trial, provoked the prosecutor's comment by accusing Terri Cole of being of liar (PCR Tr. 359-360). Appellant focuses on the first of counsel's explanations and asserts that it strains credulity in light of counsel's unrelenting attack upon Terri Cole (App.Br. 39-40). However, while it is clear that counsel pulled no punches in attempting to show that Terri Cole was lying, counsel was particularly careful not to portray herself as unsympathetic to the fact that Terri Cole was *dying* (Tr. 1446-1447). Counsel's decision to refrain from objecting to the prosecutor's comment was reasonable.

Moreover, it is also apparent that defense counsel, at least in some respects, provoked the prosecutor's comment. For example, defense counsel cited the fatal nature of Terri Cole's condition as a reason for *not* engaging in a more vigorous cross-examination; she stated:

> It was hard for me to cross-examine in a way that I would have liked to cross-examine if she had been healthy because I wanted you to – I wanted to have some

> credibility with you people. I wanted to show you that I was not an animal, I was not an attorney going after someone dying, but it dearly hurt my defense. I was not able to –
>
> [an objection prompted defense counsel to withdraw her last statement, but defense counsel then proceeded as follows:]
>
> It did hurt my cross-examination. I am not an animal who would go to a woman who is there dying from Lou Gerig's [sic] disease.
>
> * * *
>
> When she testified, for me to come on and cross-examine here in a hostile way, well, I didn't. I didn't feel it was appropriate and I was hoping we could get this all through to you some other way than me being difficult on Ms. Cole. We all have feelings.

(Tr. 1446-1447). In other words, defense counsel attempted to gain credibility by pointing out that she had refrained from attacked a dying woman.

Accordingly, when the prosecutor argued that a not-guilty verdict would call the "dying woman" a liar, the prosecutor was, in a rhetorical fashion, pointing out that the defense, who had argued for a not-guilty verdict, *was* "going after" or "being difficult" with "someone dying." Additionally, it was not clearly erroneous for the motion court to observe that Terri Cole's terminal condition was a legitimate factor that could have impacted upon her desire to tell the

truth (PCR L.F. 459).[8] Indeed, the prospect of death often removes motives and barriers that sometimes preclude people from telling the truth.

In short, as this Court determined on direct appeal, there was "no error" arising from this remark, *State v. Cole*, 71 S.W.3d at 170 n. 9, and, consequently, there was no meritorious basis for counsel to object. Moreover, even if the prosecutor's fleeting comment was irrelevant, or phrased in a manner that might have evoked an emotional response, appellant was not prejudiced, because the prosecutor merely referred to a well-known fact that had already been placed before the jury and argued by defense counsel (*see* Tr. 910, 953, 1442, 1446-1447). In other words, because Terri Cole's condition was well known and remarked upon by both parties it is not reasonably probable that the prosecutor's remark had any power to "rile up" the jury and convince it to convict appellant regardless of the evidence. The motion court did not clearly err.

C. Penalty-Phase Closing Argument

Appellant also contends that counsel was ineffective during penalty-phase closing argument, for failing to object to the following:

> I'll ask you to consider this: I'm not saying what you need to do. And you all told me you could consider it and give it realistic consideration after you've

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[8] Respondent acknowledges that it did not previously recognize this possibility. On direct appeal, the state conceded that Terri Cole's medical condition "was not relevant to the prosecutor's contention that she was a credible witness" (Resp.Dir.App.Br. 47).

heard all the evidence, and that's what I'm asking to you do now. I'm not trying to tell you this is easy. I'm not telling you it's gonna be nice. **But I'll tell you there have always been times in our society when citizens, patriots, from time to time have stepped up and done the things that need to be done to protect society.** It's unfortunate but sometimes it happens.

That's what needs to be done in this case.

(Tr. 1654-1655).

In his amended motion, counsel's failing to object to this argument was noted in conjunction with counsel's failing to object to the prosecutor's arguments about "terrorism," i.e., that appellant had "terrorize[d]" Terri Cole (PCR L.F. 50). It was alleged in the amended motion that the prosecutor's arguments were designed to capitalize upon the jurors' fear of terrorists and suggest that recommending a sentence of death was their patriotic duty (PCR L.F. 50-51). The motion court issued findings of fact and conclusions of law specific to that claim, concluding that the prosecutor's comments about "terrorizing" Terri Cole were supported by the evidence (PCR L.F. 460-461).

On appeal, appellant has adjusted and refined his claim by focusing on the "patriots" remark and removing the "terrorist" dross that was the original focal point of his claim (App.Br. 46). He now simply argues that the "patriots" remark was an emotional appeal designed to persuade the jurors that if they "returned a sentence of life without parole they would be shirking their duty as citizens and patriots" (App.Br. 47). But the record does not support this interpretation of the argument.

At the evidentiary hearing, counsel testified that she did not object to this argument because she did not find it objectionable (PCR Tr. 364). She explained that she did not get the impression that the prosecutor was telling the jurors that it was their patriotic duty to recommend a sentence of death (PCR Tr. 364-365). Defense counsel was correct.

As is evident from the record, the prosecutor merely asked the jurors to "give [the death penalty] realistic consideration after you've heard all the evidence" (Tr. 1654). The prosecutor then acknowledged that considering the death penalty was not an "easy" task, but the prosecutor reminded the jurors that living in our society requires citizens to fulfill their civic obligations. The prosecutor further observed that those who fulfill their sometimes difficult civic obligations are "patriots." This was entirely proper, for it did not imply that a sentence of life without probation or parole was not patriotic, or that a sentence of death was the only patriotic verdict. Rather, it merely stated the self-evident fact that making the difficult determination of the appropriate sentence was a citizen's patriotic duty. In fact, the argument was very similar to some of the various injunctions placed upon the jurors by the penalty-phase instructions, e.g., "It is your duty to render such verdict under the law and the evidence concerning the punishment to be imposed as in your reason and conscience is true and just" (L.F. 188).

Additionally, the prosecutor's comment was properly responsive to the argument that defense counsel made in her closing argument. She stated:

> This isn't just a matter of law; this is a matter of conscience, morality and ethics. It's a matter of appealing to you of a higher value system to show mercy. I'm asking you to do all of these things. I'm asking you to take the high road.

(Tr. 1651-1652).

By stating that the issue was not a matter of law, defense counsel certainly invited the prosecutor to remind the jurors that the issue did concern matters of law, including their stated willingness to realistically consider the death penalty. Also, by appealing to those of "a higher value system" and requesting mercy, defense counsel certainly invited the prosecutor to remind the jurors that there are other, sometimes conflicting, high moral and ethical values – i.e., justice versus mercy. In short, the prosecutor's comments were properly responsive and did not use improper methods to try and compel a sentence of death. This point should be denied.

II.

The motion court did not clearly err in denying, after an evidentiary hearing, appellant's claim that counsel was ineffective for failing to present evidence of his good behavior in the county jail, because (1) counsel reasonably chose a different mitigation strategy and elected not to present such evidence, and (2) appellant was not prejudiced.

Appellant contends that the motion court clearly erred in denying his claim that counsel was ineffective for failing to put on evidence of his good behavior in the county jail (App.Br. 48). At the evidentiary hearing, he presented evidence of his good behavior through the testimony of two corrections officers and Sister Judith Klump (PCR Tr. 274-276, 285-288, 296-298). He claims that there is a reasonable probability that the jury would have recommended a sentence of life imprisonment if counsel had presented their testimony to the jury (App.Br. 48).

A. The Standard of Review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 508, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id*. "The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Supreme Court Rule 29.15(i).

B. Counsel Reasonably Chose not to Present Evidence of Appellant's Good

Behavior in the County Jail

To prevail on a claim of ineffective assistance of counsel, appellant must "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984). Appellant must also show prejudice – that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

"The attorney's conduct must be so egregious that it undermines the proper functioning of the adversarial process to such an extent that the original trial cannot be relied on as producing a just result." *Clayton v. State*, 63 S.W.3d 201, 206 (Mo. banc 2001). If the appellant fails to show either deficient performance or prejudice, the court need not address the other component. *State v. Allen*, 954 S.W.2d 414, 417 (Mo.App. E.D. 1997).

In denying this claim, the motion court stated:

> 5. Amended motion claim 8(G) asserts ineffective assistance of counsel for failure to present mitigating evidence of Movant's activities in the St. Louis County Justice Center.
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> * * *
>
> Trial counsel testified that she had previously used jail behavior evidence in capital trials. She indicated that she visited Movant more than twenty-five (24) times and that each visit was a contact (face to face) visit. She stated that she was aware that Movant had a job in jail and that he attended religious

> services[9] but that she rarely uses this information because her experience has shown her that it is not influential with jurors.[10] In addition, it was trial counsel's strategy to have his family and friends discuss Movant's work ethic, his religious upbringing and participation in church acitvities. Clearly much of the post-conviction testimony would have been cumulative if not contraditory, to that presented by trial counsel through Movant's family, friends, and pastor. At least three mitigation witnesses called on behalf of Movant discussed his church upbringing and religious background including his Pastor. Much of the proposed testimony would have been cumulative if offered.

(PCR L.F. 472-473). The motion court did not clearly err.

At the evidentiary hearing, counsel testified that she ultimately decided on a mitigation theory of presenting good character evidence and trying to humanize appellant (PCR Tr. 374,

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[9] As to appellant's attending religious services while in jail, counsel stated that she did not recall if she was aware of that fact (PCR Tr. 371). However, she testified that she was aware of his attending religious services while out of jail (PCR Tr. 371).

[10] Counsel testified that she had used good-jail-behavior evidence in other capital cases (she had tried approximately nineteen in her career), and, while she did not make a blanket statement about the influential value of this type of evidence with juries, she did testify that she did not think it would be helpful in appellant's case (PCR Tr. 372). Additionally, she testified that this type of evidence is sometimes less "influential" due to cross-examination that can highlight prior bad acts, e.g, appellant's failing to return to confinement (PCR Tr. 485).

481). To that end she contacted approximately twenty-five people, whose names were given to her by appellant and his family (PCR Tr. 372). As for evidence of appellant's good behavior in jail, counsel testified that she was familiar with that type of evidence, having presented such evidence at other trials (PCR Tr. 368). She testified that she talked to some of the corrections officers when she visited the jail and asked them if they had any favorable information about appellant, and she pointed out that appellant never mentioned any religious services that he attended while in jail (PCR Tr. 371-372). She also testified that she knew about appellant's job, and that she understood that having a job meant that appellant was a good prisoner, but she explained that she did not think such evidence "would be helpful in this case" (PCR Tr. 372). She further testified that she thought about presenting evidence of appellant's good behavior in jail, but that she decided not to (PCR Tr. 484). This decision was prompted, at least in part, by the large number of penalty-phase witnesses that she had prepared for trial (PCR Tr. 484).

As is evident, counsel's performance in developing a mitigation strategy did not fall below an objective standard of reasonableness. Admittedly, counsel's efforts in uncovering evidence related to appellant's good behavior in jail were minimal. However, counsel *did* seek information from corrections officers, and she knew that appellant had a job in prison – a fact that demonstrated appellant's good behavior in itself. Thus, when counsel decided not to further pursue such evidence and decided to concentrate her considerable efforts elsewhere (she ultimately called ten witnesses during the penalty phase), it was neither a wholly uninformed nor unreasonable decision. *Compare Williams v. Taylor*, 529 U.S. 362 (2000) (the defense attorneys, who only presented minimal mitigating evidence from three witnesses

(including an unplanned witness pulled out of the audience at trial), began preparing for penalty phase only a week before trial, and they did not obtain certain records (because they incorrectly believed that the records were privileged), they failed to introduce available evidence of the defendant's borderline mental retardation, they did not seek prison records, and they failed to return a call of a witness who offered to testify favorably for the defendant).

"In terms of an attorney's duty to investigate, an investigation need only be adequate under the circumstances, and 'the reasonableness of a decision not to investigate depends upon the strategic choices and information provided by the defendant.' " *Ringo v. State*, 120 S.W.3d 743, 748 (Mo. banc 2003). "When counsel knows generally the facts that support a potential defense, 'the need for further investigation may be considerably diminished or eliminated altogether.' " *Id*. And, in assessing a decision not to investigate, courts must "apply[] a heavy measure of deference to counsel's judgments." *Ervin v. State*, 80 S.W.3d 817, 824 (Mo. banc 2002).

Here, defense counsel was a seasoned, capital-litigation attorney, who had tried approximately nineteen capital cases, and who had used good-jail-behavior evidence in previous cases (PCR Tr. 368, 448). She was, therefore, well acquainted with capital litigation and had a good understanding of the efficacy of certain types of evidence in such cases (*see* PCR Tr. 448, 465-468, 484-485). She had a general idea of appellant's good behavior in jail, because she was aware of the fact that good behavior was a necessary component of being employed there (PCR Tr. 372). She was not aware of appellant's religious observances while in jail, but appellant failed to mention that fact to her (Tr. 371) She considered presenting

evidence of appellant's good behavior in jail, but concluded that such evidence would not be helpful, and decided to forego such evidence in favor of the numerous other witnesses that she had prepared for trial (PCR Tr. 372, 484). In short, being reasonably informed of a possible alternative source of mitigating evidence (and hearing nothing additional during numerous visits with appellant), counsel weighed the alternatives and developed a reasonable mitigation strategy that was not dependent upon appellant's good behavior in jail. This decision did not fall below an objective standard of reasonableness.

"Where trial counsel reasonably decides as a matter of trial strategy to pursue one evidentiary course to the exclusion of another, trial counsel's informed, strategic decisions not to offer certain evidence is not ineffective assistance." *State v. Johnston*, 957 S.W.2d 734, 755-756 (Mo. banc 1997). Indeed, as this Court has stated: "It is not ineffective assistance of counsel for an attorney to pursue one reasonable trial strategy to the exclusion of another, even if the latter would also be a reasonable strategy. *Clayton v. State*, 63 S.W.3d at 207-208. Accordingly, where counsel made a reasonable decision to pursue one mitigation strategy to the exclusion of another (and ultimately presented the testimony of ten witnesses in support of that strategy), it cannot be said that counsel's performance fell below an objective standard of reasonableness – especially where, as will be discussed in greater detail below, the chosen strategy produced a substantial quantum of favorable mitigation evidence, much of which was similar in nature to the good-jail-behavior evidence offered by the corrections officers and Sister Klump at the evidentiary hearing. *See id*. at 209. This point should be denied.

C. Appellant was not Prejudiced

In addition to the foregoing, appellant was not prejudiced by counsel's choosing to forego evidence of his good behavior in jail. In denying this claim, the motion court stated:

> In support of his claim, Movant presented the testimony of two jail officers, Lt. William Bradford and Corrections Officer Romel Cochrall along with the testimony of a former member of prison ministries, Sister Judith Klump. The corrections officers testified that Movant was model prisoner, worked hard and never violated the rules. Both officers were unaware of Movant's earlier violations of jail rules while in custody on previous crimes including a conviction for Failure to Return to Confinement. The witnesses expressed surprise at learning of his prior violations and agreed that it could affect their overall opinions of Movant.[11] Their testimony would have been contradicted [by] proposed evidence of his "life history". Cochrall stated that he could base his opinion only on the time he was in contact with defendant.
>
> Sister Klump indicated that she couldn't recall whether she had been

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[11] Only one of the corrections officers, Romel Cochran, indicated that a failure to return could affect his opinion. He testified, "Well, I mean, before I would make a decision I would take certain things into consideration. Knowing what you've just told me, I mean, I think there should be certain things that should be taken into consideration" (PCR Tr. 293). He then explained that his previous testimony about appellant's being an good inmate was based strictly upon his personal interaction with appellant (PCR Tr. 293).

> interviewed by trial counsel but testified that she recalled Movant being a religious man while in jail who attended every possible religious service. While Sister Klump expressed surprise at Movant's previous jail rule violations, she indicated that it would not affect her opinions of Movant.
>
> * * *
>
> Clearly much of the post-conviction testimony would have been cumulative if not contradictory, to that presented by trial counsel through Movant's family, friends, and pastor. At least three mitigation witnesses called on behalf of Movant discussed his church upbringing and religious background including his Pastor. Much of the proposed testimony would have been cumulative if offered.
>
> These three (3) witnesses who testified for the first time at the post-conviction relief hearing presented no significant evidence which would suggest that the outcome of the trial would have been different had they been called as witnesses. Given the aggravating factors found by the jury, Movant has not shown that his additional mitigating testimony would have produced a different result had it been presented at trial. Point denied.

(PCR L.F. 472-474). The motion court did not clearly err.

At the evidentiary hearing, appellant presented the testimony of two corrections officers and Sister Klump. The two corrections officers testified that appellant was an excellent worker, that appellant took pride in his work, that appellant was an "ideal" inmate, that appellant followed all the rules, that appellant conducted himself appropriately, that appellant

was respectful, that appellant was not argumentative, that appellant was not a trouble maker, that appellant was very mild mannered, and that appellant regularly attended religious services (PCR Tr. 274-276, 285-288). Sister Klump testified that appellant attended her scripture classes, that appellant was an excellent student, that appellant prayed from the heart, that appellant was active in class, that appellant was respectful and polite, and that appellant was a leader in the class who knew more than most of the others (PCR Tr. 296-298).

However, as the motion court observed, much of their testimony was cumulative to the testimony offered by the ten witnesses that counsel called during the penalty phase. For example, appellant's mother testified that appellant was dependable, that he helped people, and that he was a peacemaker (Tr. 1596-1597). She further testified that appellant was a Christian, that he attended church, and that he had been raised in the church (Tr. 1597). Appellant's sister testified that appellant was a helpful person who went out of his way to help others (Tr. 1601). Appellant's cousin testified that appellant was dependable (Tr. 1603). One of appellant's good friends testified that appellant had strong values and morals, that appellant attended church, and that appellant was clean cut (Tr. 1607). Another of appellant's friends also testified that appellant was willing to help and was supportive in times of need (Tr. 1627). Appellant's pastor confirmed that appellant attended church on a regular basis, that appellant was a warm and compassionate person, and that appellant always got along with others (Tr. 1610-1611).

A friend of the family testified that appellant helped his mother, that appellant was kind, and that he was always willing to help (Tr. 1613). Another friend of the family confirmed that appellant attended church, and that after high school appellant got a job and was 'willing to go

to work and work everyday" (Tr. 1615-1616). One of appellant's father's friends testified that he got appellant a job at the St. Louis Zoo, and that appellant was a "perfect" employee who was always there and always on time (Tr. 1618). He further testified that appellant was always respectful, a hard worker and a quick learner, and that he was remembered at the zoo as one of their best employees (Tr. 1619-1620). Another of appellant's father's friends confirmed that appellant was respectful, and that appellant attended church (Tr. 1624).

Thus, to the extent that the two corrections officers and Sister Klump were prepared to offer testimony regarding appellant's strong work ethic and good nature, such testimony was wholly cumulative to the substantial evidence offered by the ten witnesses that counsel called during the penalty phase. It is simply not reasonably probable that a few additional scraps of character evidence would have tilted the balance in appellant's favor. "An attorney is not ineffective for failing to offer cumulative testimony." *Clayton v. State*, 63 S.W.3d at 209.

Of course, as appellant points out, the testimony of the two corrections officers and Sister Klump had another dimension that the testimony of the other witnesses lacked: they testified about their observations of appellant while in jail (App.Br. 58-59). And, as appellant correctly points out (App.Br. 51), "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of this character that is by its nature relevant to the sentencing determination." *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986). The question, therefore, is whether that additional aspect of their testimony gave rise to a reasonable probability of a different outcome. It did not.

First, as the record shows, appellant's crimes arose out of his domestic troubles with

Terri Cole. In other words, appellant's murderous intentions revolved around Terri Cole and, by unfortunate coincidence, Anthony Curtis. Thus, while appellant was portrayed as violent and depraved in his actions toward Terri Cole and Anthony Curtis,[12] he was not portrayed as violent toward society at large or potentially dangerous to other prisoners or corrections officers. Consequently, while certainly relevant in a general fashion, evidence of appellant's ability to adjust favorably to life in jail was of only limited evidentiary value in terms of what aggravating evidence it tended to refute. Second, the probative value of the evidence was further limited by the fact that it was not directly applicable to appellant's future incarceration. Evidence of favorable adjustment to life in jail is simply not the same as evidence of favorable adjustment to life in prison.

And, finally, even if it is generally true that such evidence is *relevant*, that does not always mean that it will be *favorable* in a given case. For example, here, the defense strategy in the penalty phase was, as counsel explained, to save appellant's life (i.e., obtain mercy) by humanizing appellant and showing the value of his life. However, while counsel presented substantial evidence of the value of appellant's life and argued strenuously for mercy, counsel

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[12] One of the aggravating circumstances found by the jury was that "the murder of Anthony Curtis involved depravity of mind, the murder was outrageously and wantonly vile, horrible, and inhuman" (L.F. 179). The jury was instructed that "depravity of mind" was only present if they found "that the defendant committed repeated and excessive acts of physical abuse upon Anthony Curtis and the killing was therefore unreasonably brutal" (L.F. 179).

had to walk a careful line: counsel had to acknowledge the need for punishment and simultaneously argue that life imprisonment was an adequate punishment for appellant's heinous crimes. Thus, counsel argued:

> And I'm going to plead for my client's life. **You can accomplish everything that you want to do by giving him life without the possibility of probation and parole.** Rather than giving him the death penalty.
>
> He will be incarcerated for the rest of his life. **That's obviously one thing you would be concerned with with your verdict.** He will be punished. And several people said on voir dire – whenever that was; it seems like it's a long time ago; we have been through so much together – he will be punished every day of his life.
>
> **Accountability? That could also be served by life without the possibility of probation and parole.** Ladies and gentlemen, we're talking about life and death here. Life and death.
>
> * * *
>
> **You can do everything you need to do by giving him life without the possibility of probation and parole.**
>
> If it would bring Mr. Curtis back, perhaps death would be the appropriate punishment. But it won't. It won't change his mother's missing her son. And I understand that. I'm a mother, too. And I'm sure that many of you are parents. And you can relate to her.

But my client's mother is a dear person, too. Religious. Tries to live by the good book. She told you what kind of a son her son was.

What we're looking at here in this trial and the reason for the penalty phase is that the law in its wisdom has given a chance to the Defense to show you the measure of a man. Not just over a certain period but to show you what he was like before. And you saw 9 or 10 people come in here and testify that they cared for him, that he had done things for them, that he was worthwhile human being. You heard all these people. And they were all age groups. They were young. Number of older people. Who were friends with his father. And they told you they had helped him. That he had helped them.

You can do everything you want to do by giving him life without the possibility of probation and parole.

You've been given a mitigator that he has no significant criminal history. I guess the State thought they were proving that he did have a significant criminal history, but that mitigating circumstance is there.

* * *

And what are the ends of justice? **The ends of justice are to protect, to punish, and you can do that all with life without the possibility of probation and parole.**

* * *

I submit to you, ladies and gentlemen, you can do everything you can and

want to do by giving him life.

* * *

But **I'm asking you to show mercy and do all the things that you feel a punishment should do to punish and protect society and hold someone accountable.** And don't be guided by the feelings of just basic revenge.

* * *

Do everything that you need to do by giving my client life without the possiblity of probation and parole.

(Tr. 1646-1649, 1651-1652).

In light of these arguments, which repeatedly stressed the adequacy of a life sentence to serve the ends of justice, it was obviously important to avoid any intimation that a sentence of life imprisonment was not an adequate punishment. And, consequently, it was entirely reasonable for counsel to avoid calling witnesses who might confirm in the jurors' minds that appellant was content and living a reasonably normal life in prison. Indeed, if counsel had offered evidence that suggested that appellant was capable of living comfortably in prison, such evidence would have completely undermined, or at least greatly weakened, the basis of counsel's arguments. In other words, to present a strong argument in favor of life, it was imperative that counsel assure the jury, in no uncertain terms, that a sentence of life imprisonment was a severe and appropriate sentence under the circumstances.

In addition, while undermining defense counsel's argument, it would have given the prosecutor an opportunity to argue that life imprisonment was not an adequate punishment.

Moreover, in light of the prosecutor's arguments regarding appellant's earlier *failure* to conform to the rules of incarceration (Tr. 1636), evidence of appellant ability to actually conform to the rules when he wanted to, would have provided a basis for the prosecutor to suggest that appellant was only following the rules because of his self-serving desire to obtain benefits in jail and because, now that the stakes were high, appellant wanted to ingratiate himself with the jury in a last ditch effort to avoid responsibility for his actions.

Lastly, appellant argues that the testimony of the corrections officers and Sister Klump would have "carried more weight with the jury." However, that is unlikely. Certainly, if there were some question as to whether appellant was actually good while in jail, the testimony of the corrections officers and Sister Klump would carry more weight than, say, appellant's testimony. However, with regard to the facts that counsel actually wanted to establish during the penalty phase – that appellant was man whose life had intrinsic value that was worth saving – the testimony of the ten witnesses offered at trial was far more meaningful and persuasive than the limited testimony offered by two corrections officers and Sister Klump. They, unlike the ten witnesses who testified in appellant's favor, had only had limited, professional interaction with appellant after his arrest in the case at bar.[13]

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[13] Appellant also seems to suggest, in arguing that he was prejudiced by counsel's failing to call the corrections officers and Sister Klump, that counsel was ineffective for failing to make a more individualized closing argument (App.Br. 61-62). This, however, is a new claim of ineffective assistance of counsel, and it should not be considered. In any event, there is no

In sum, in light of the substantial evidence offered in mitigation, there is no reasonable probability that the minimally-relevant evidence of appellant's good behavior in jail would have altered the jury's evaluation of all of the evidence and convinced it to recommend a sentence of life imprisonment. In fact, to the contrary, in light of the mitigation theory adopted by defense counsel, it is reasonably probable that evidence of appellant's adjustment to incarceration could have undermined the defense theory (by suggesting that it was not an adequate punishment) and given the prosecution an additional means of arguing against a sentence of life imprisonment. The motion court did not clearly err in concluding that appellant was not prejudiced. This point should be denied.

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reason to believe that the testimony of the corrections officers and Sister Klump would have substantively altered the closing argument that counsel gave (except to perhaps undermine its basic foundation, as discussed above); and, as is evident from the portions of the argument quoted above, the record shows that counsel *did* make an individualized argument while simultaneously pleading for mercy.

III.

The motion court did not clearly err in denying, after an evidentiary hearing, appellant's claim that counsel was ineffective for failing to present mitigating evidence of his "extreme emotional disturbance," because (1) counsel adequately investigated appellant's mental health and, finding no evidence of extreme emotional disturbance, developed a reasonable mitigation strategy that was consistent with the defense theory presented in guilt phase; and (2) appellant was not prejudiced.

Appellant contends that the motion court clearly erred in denying his claim that counsel was ineffective for failing to present mitigating evidence of his "extreme emotional disturbance" at the time of the murder (App.Br. 63). At the evidentiary hearing, appellant offered the testimony of Dr. William Logan, who opined that at the time of the offenses, appellant was, due to major depression, under the influence of extreme emotional disturbance (PCR Tr. 89-90). Appellant argues that there is a reasonable probability that such testimony would have altered the outcome of the penalty phase (App.Br. 63).

A. The Standard of Review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, *10 S.W.3d 508, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made."* *Id.* *"The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Supreme Court Rule 29.15(i).*

B. Counsel Adequately Investigated Appellant's Mental Health and Developed

a Reasonable Mitigation Strategy

To prevail on a claim of ineffective assistance of counsel, appellant must "show that counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, *466 U.S. 668, 687-688 (1984). Appellant must also show prejudice – that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."* Id. *at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome."* Id.

"The attorney's conduct must be so egregious that it undermines the proper functioning of the adversarial process to such an extent that the original trial cannot be relied on as producing a just result." Clayton v. State, *63 S.W.3d 201, 206 (Mo. banc 2001). If the appellant fails to show either deficient performance or prejudice, the court need not address the other component.* State v. Allen, *954 S.W.2d 414, 417 (Mo.App. E.D. 1997).*

In denying this claim, the motion court made extensive findings of fact and conclusions of law, stating, in part:

> *amended motion claims 8(B), and 9(B) submit ineffectiveness in failing to present the testimony of a psychiatrist such as Dr. William Logan in the penalty phase of the trial. Prior to trial, Movant's trial counsel requested an evaluation be completed pursuant to Sections 552.020 and 552.030, RSMo. Those evaluations were completed by Dr. Richard Scott of the Missouri Department of Mental Health and filed with this Court on July 3, 2000. The Court has taken judicial notice of those reports and they were admitted into evidence as Respondent's exhibits A and B. After Dr. Scott filed his reports finding Movant to be free from mental disease or defect and competent to stand trial, Movant's trial counsel requested a second examination be completed by an examiner of Movant's choosing. That evaluation was completed by Dr. Michael Armour and filed with this Court on December 14, 2000. The Court has taken judicial notice of this report and it was admitted into evidence as Respondent's exhibit C. Dr. Armour found the Movant to be free from mental defect or disease and competent to stand trial.*

* * *

[T]rial counsel testified that she requested the evaluations of Movant in order to discern the existence of any mental problems and potential mitigation. Both Dr. Scott and Dr. Armour eliminated depression as a possible diagnosis for Movant. During Movant's interviews with these doctors in the year preceding the trial he denied committing the acts which caused the death of Anthony Curtis and the injuries of Terri Cole. Similarly, Movant's sworn testimony at trial indicated that on the night of the murder ". . . I was not angry. I loved my ex-wife and I didn't have no intentions of hurtin' her" [Trial transcript p. 1342]. Throughout his testimony he vehemently denied committing any acts against either victim. See Winfield v. State, 93 S.W.3d 732, 740-741 (Mo. banc 2002).

Trial counsel testified that in addition to requesting the evaluations, she interviewed Movant and his family concerning his mental state at the time of the offenses. She inquired as to his emotional state, his use of alcohol, and his use of any drugs. Trial counsel's inquiries were met with negative responses from Movant and his family. Trial counsel was not informed of any mental health issues with Movant's family. Movant has failed to prove that he provided trial counsel with pertinent and sufficient information regarding how to contact potential witnesses, or that such information was readily availiable. Jones v. State, 767 S.W.2d 41, 43-44 (Mo. banc 1989).

* * *

This Court finds that trial counsel was not ineffective in [not] soliciting the testimony of Dr. Logan. Trial counsel made reasonable efforts to investigate the mental status of Movant, as he was examined by both Dr. Scott and Dr. Armour. Trial counsel had no reason to dispute the findings of these experts. Both reports found him to be free of depression or other depressive disorders. Dr. Scott noted that he asked Movant how things were going in general in his life in August 1998; Movant stated, "Actually, my life was going fine. That's true. My life was going fine." (Scott report page 3). Movant indicated to Dr. Scott that his visit to his ex-wife's home on the evening of the event was "Routine". (Scott p. 4). Dr. Scott specifically concluded that:

"No statements suggested that the defendant was unable to direct his behavior, was speaking as though he did not make sense, or was otherwise behaving in a manner suggesting he was suffering severe impairment in his emotional or cognitive abilities." (Scott p. 5) [emphasis added].

Dr. Scott indicated that throughout his interviews with Movant, which occurred on March 24, 2000 and June 26, 2000 and lasted approximately three (3) hours, Movant repeatedly denied that he committed his crimes. Dr. Scott testified that the results of the MMPI conducted during his evaluation were inconsistent with any finding of depression. Dr. Armour, who was retained by defense counsel to evaluate Movant, indicated in his report that Movant stated, "… he did not touch his ex-wife and did not stab the deceased in the back." (Dr. Armour p. 3). Dr. Armour reported that the Movant stated he does not feel depressed and does not have feelings of helplessness, hopelessness and worthlessness. (Armour p. 8).

* * *

Trial counsel made reasonable efforts to investigate the mental status of Movant and reasonably concluded based upon the denials of Movant and his family that there was no basis in pursuing the matter further. Where trial counsel had made reasonable efforts to investigate the mental status of a defendant, as here where he was examined by Dr. Armour and Dr. Scott, counsel was not ineffective for not shopping for a psychiatrist or psychologist who would testify in a particular way. []Ringo v. State, [120] S.W.3d [743] (Mo. banc []2003); Winfield at 741; Putney v. State, 785 S.W.2d 562, 563 (Mo.App. 1990); Shields v. State, 757 S.W.2d 247, 248 (Mo.App. 1988). Trial counsel had no reason to dispute the findings of the experts who were consulted prior to trial. Counsel is not ineffective for failing to get a [sic] multiple psychiatric examinations when the initial evaluations failed to disclose mental disease or defect. Movant has failed to prove that the extent of trial counsel's investigation in this case was unreasonable, considering

"all the circumstances" as required under Strickland.

(PCR L.F. 464-470). The motion court did not clearly err.

The record shows that on September 29, 1999, the state filed its "notice of Aggravating Circumstances" (L.F. 3, 28-31). About a week later, on October 6, 1999, counsel moved for a psychiatric examination (L.F. 3, 33-35). The motion was granted, and appellant was examined both for competency to stand trial and responsibility at the time of the crime (L.F. 37-38).

On July 6, 2000, Dr. Richard G. Scott, sent his reports to the trial court (L.F. 6; Resp.Exs. A-B). In that report he concluded that at the time of the offense appellant was not suffering from a mental disease or defect (Resp.Ex. B). He further concluded that appellant was capable of knowing and appreciating the nature, quality and wrongfulness of his conduct (Resp.Br. B). In reaching those conclusions, Dr. Scott made several significant observations, including:

(1) that appellant said, regarding his life at the time of the crime, "Actually, my life was going fine. That's true. My life was going fine;"

(2) that appellant denied any alcohol or drug use during that time period, including the use of prescription medication;

(3) that appellant reported that he had never required psychiatric treatment;

(4) that appellant said he went to Terri Cole's residence to see his children, and that appellant "described no unusual ideas or beliefs, or confusion regarding his purpose for going to the home;"

(5) that there was no information suggesting that appellant had "ever suffered a head injury or other organic impairment that would cause a cognitive disorder;"

(6) that, according to employment records and interviews of co-workers, appellant "conducted his routine activities without obvious impairment in the week prior to the alleged offense;"

(7) that appellant's reported actions during the attack suggested that he was "capable of interpreting his circumstances and redirecting his actions as needed to accomplish his goal;"

(8) that appellant's use of a tire iron in breaking into the house, a method he had used on a previous occasion, suggested a "consistency in the method of operation;"

(9) that "[n]o statements suggested that [appellant] was unable to direct his behavior, was speaking as though he did not make sense, or otherwise was behaving in a manner suggesting he was suffering severe impairment in his emotional or cognitive abilities;" and

(10) that appellant's "description of the events surrounding the alleged offense suggests a rational motive for going to the home and no sign of psychological or emotional problems at the time of the alleged offense."

(Resp.Ex. B) (emphasis added).

After receiving these reports, counsel requested a second mental examination (L.F. 6). This motion was also granted; and, on December 14, 2000, appellant's hand-picked psychologist, Dr. Michael T. Armour,[14] filed his report with the court (L.F. 7; Resp.Ex. C). Dr. Armour's report was largely consistent with Dr. Scott's report, and Dr. Armour also concluded that appellant did not suffer from a mental disease or defect at the time of the crime (Resp.Ex. C). Dr. Armour concluded:

> *No evidence came to light during this evaluation that Mr. Cole has suffered from a serious mental disorder, with the exception of Alcohol Abuse, prior to or during the alleged offense. Mr. Cole denies experiencing symptoms of*

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[14] When she hired Dr. Armour, counsel asked him to look for mitigation evidence, including evidence of emotional disturbance (PCR Tr. 425, 430-432, 467). Dr. Armour did not recall a specific request along those lines, however, he looked generally for mitigating circumstances (PCR Tr.II 75-76).

paranoia or other delusional beliefs, or hallucinations prior to or during the time period surrounding the alleged offense. His thought process are logical and sequential, with no indication of a formal thought disorder. His history is negative for treatment for a mental disorder by any mental health professional on either an inpatient or outpatient basis.

(Resp.Ex. C) (emphasis added).

Consistent with these reports, counsel testified at the evidentiary hearing that she did not observe or discover any evidence suggesting that appellant was depressed or otherwise suffering from a mental disease or defect at the time of the offense (PCR Tr. 429). She testified that she spoke with appellant, appellant's mother and appellant's sister on a routine basis, and that she interviewed approximately twenty-five other witnesses provided by appellant and his family, and that nobody ever mentioned depression, mental illness, or any history of mental illness, alcoholism or medical problems in the family (PCR Tr. 372, 426-429, 433-434, 437-441, 459-466, 439). Counsel testified specifically that she asked appellant, his mother and his sister whether there was any history of mental problems, but that none of them mentioned any significant mental- or medical-health history (PCR Tr. 426-427, 429, 436-437, 440-441, 459-466, 469).[15] *Counsel considered presenting the extreme-emotional-disturbance mitigator but ultimately concluded that she did not have the evidence to support such a theory (PCR Tr. 429).*

As is evident, counsel's investigation of appellant's mental state at the time of the crime was in no way deficient. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying

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[15] Indeed, the only depression counsel noted was appellant's post-arrest depression in jail; however, she saw no signs of clinical depression (a conclusion that was completely backed up by the two expert evaluations performed by Drs. Scott and Armour) (PCR Tr. 441, 459-461; Resp.Exs. A-C).

a heavy measure of deference to counsel's judgments." ***Ervin v. State****, 80 S.W.3d 817, 824 (Mo. banc 2002) (quoting* ***Strickland****, 466 U.S. at 691). "What investigation decisions are reasonable depends 'critically' on what information the defendant has supplied his lawyer."* ***Id.*** *"And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."* ***Id.***

Here, despite numerous conversations and contacts, appellant and his family members – those who were in the best position to know appellant's history (and family history) – never divulged any pertinent information to defense counsel when asked if there was any personal or family history of mental problems. Thus, counsel cannot be blamed for failing to discover and pursue evidence that might have supported the submission of the extreme-emotional-disturbance mitigator. ***See Lyons v. State****, 39 S.W.3d 32, 41 (Mo. banc 2001) (where counsel has conducted a reasonable investigation, "counsel cannot be deemed ineffective for failing to discover evidence . . . that appellant's family did not share with them during the investigation.").*[16]

Additionally, even though appellant and his family did not divulge any significant evidence of mental health problems, counsel requested two mental examinations (L.F. 3, 6). And, consistent with the information that counsel was hearing from appellant and his family, neither expert found any history of mental illness, or diagnosed appellant as suffering from depression at the time of the crimes. To the contrary, both experts affirmed that appellant was not suffering from a mental disease or defect at the time of the crimes (Resp.Exs B-C). Moreover, as outlined above, Dr. Scott concluded that nothing showed that appellant was "suffering severe impairment in his

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[16] The one inconsistency between the information gained from appellant and his family was appellant's apparent alcoholism; however, as will be discussed below, portraying appellant as an alcoholic did not fit into counsel's mitigation strategy, which was to provide the jury with strong evidence of appellant's intrinsic value and give them grounds upon which to mete out mercy (while remaining consistent with the defense evidence already presented in guilt phase).

emotional or cognitive abilities," and that there was "no sign of psychological or emotional problems at the time of the alleged offense" (Resp.Ex. B).

In other words, because counsel had already shopped for an expert, there was no duty to continue to shop for a more favorable expert. "[D]efense counsel cannot be found ineffective for failing to shop for a more favorable expert witness." ***Winfield v. State****, 93 S.W.3d 732, 741 (Mo. banc 2002) (where previous mental examination concluded that "a mental disturbance did not substantially affect [the defendant's] behavior during the instant offense," counsel was not ineffective for failing to investigate and present psychiatric evidence of extreme emotional disturbance through a different expert);* ***Lyons v. State****, 39 S.W.3d at 37-38 (where previous expert examination had observed "no evidence of brain damage," counsel was not ineffective for failing to obtain a different expert to conduct neuropsychological testing).*

Appellant, however, asserts that this is not merely a question of counsel shopping for another expert. He argues that counsel's performance was deficient despite the two mental examinations because "neither Dr. Scott nor Dr. Armour assessed mitigating circumstances" (App.Br. 74). But appellant is incorrect. At the evidentiary hearing, counsel testified that she specifically asked Dr. Armour to look for mitigating circumstances, including extreme emotional disturbance; and, while Dr. Armour did not recall that request, he testified that he looked generally for mitigating circumstances when he did his examination (PCR Tr. 425, 430-432, 467; PCR Tr.II 75-76). Dr. Scott also acknowledged that his evaluations are often used to show mitigating circumstances, and that if he finds evidence of a mental disease or defect, he always includes such findings in his report (PCR Tr.II 109).

In any event, appellant's argument misses the point. Appellant's claim (as framed in the amended motion and on appeal) is that counsel was ineffective for failing to obtain an expert like Dr. William Logan because an expert would have presented evidence of appellant's extreme emotional disturbance due to the ***presence*** *of major depression (and other indicators of possible mental disease or defect). Thus, regardless of whether Drs. Scott and Armour were specifically tasked to look for mitigating circumstances, and regardless of whether their reports made isolated references to the possibility that appellant was angry or hurt during the relevant time period – an*

obvious possibility that counsel was aware of and counteracted at trial with direct testimony, as is discussed below – their evaluations directly addressed whether appellant suffered from major depression or any other mental condition that might have contributed to extreme emotional disturbance. Consequently, there was no reason for counsel to continue to shop for ***yet another*** *expert who might decide to diagnose major depression and thereby give the defense a psychiatric basis for arguing extreme emotional disturbance.*[17]

*Finally, counsel's decision to forego evidence of extreme emotional disturbance was both reasonable (in light of the mitigation theory used at trial) and consistent with the defense evidence that had been presented during the guilt phase, which plainly showed that appellant did not commit the murder and that appellant was not under the influence of extreme emotion disturbance on the night of the murder (***see*** Tr. 1255-1256, 1260, 1263-1265, 1269, 1295, 1337-1338, 1342, 1361-1362, 1364, 1366, 1393-1394, 1396). Along those lines, the motion court stated:*

> *As previously noted, Movant was given the opportunity to testify in this [post-conviction] proceeding and declined. Movant has not proven facts which differ from those elicited in the testimony adduced at trial. In the only sworn testimony before this Court, Movant consistently denied involvement in the murder of Anthony Curtis or the assault on Terri Cole. Movant continually portrayed himself as a victim of assault by Mr. Curtis and not the aggressor with murderous intentions. Movant denied in his testimony that he ever entered the house (Tr. 1305), that he was anything more than "startled" (Tr. 1307-1308), and he [testified that he*[18]*] never had a knife in his hand that*

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[17] As additional support for his claim that evidence of appellant's mental distress was readily available, appellant points to Pete Ruffino, James Dawson, Dr. Fred Duhart, and Lillie Cole (App.Br. 81-89). Counsel's effectiveness with regard to these witnesses is discussed in Point IV, below.

[18] This sentence of the motion court's findings and conclusions seemed to be inartfully phrased; respondent has attempted to clarify the motion court's intended meaning by adding

night (Tr. 1313).

Trial counsel testified that the strategy discussed with Movant and his family if the case reached punishment phase was to "humanize" him for the jury by portraying Movant as a good man, loved by his family, helpful to his mother, close to his sister, friends and other relatives. This evidence was received from Movant's mother, sister, cousin, pastor, and six (6) friends. Their testimony was consistent as to Movant's fine character and personal value to the individual witnesses. To call witnesses to portray Movant in the penalty phase as a murderer who was acting under extreme emotional disturbance when he committed the same offense he denied would be inconsistent and ineffective. It would, in essence, admit to the jury that Movant is a liar and that trial counsel knowingly allowed him to commit perjury but now wishes to mitigate his actions by calling paid experts who would disagree with the previous diagnosis by court appointed experts.

Dr. Logan's testimony was inconsistent with Movant's trial testimony.

(PCR L.F. 468-469). The motion court did not clearly err.

"*Where trial counsel reasonably decides as a matter of trial strategy to pursue one evidentiary course to the exclusion of another, trial counsel's informed, strategic decisions not to offer certain evidence is not ineffective assistance.*" *State v. Johnston*, *957 S.W.2d 734, 755-756 (Mo. banc 1997). Indeed, as this Court has stated: "It is not ineffective assistance of counsel for an attorney to pursue one reasonable trial strategy to the exclusion of another, even if the latter would also be a reasonable strategy."* *Clayton v. State*, *63 S.W.3d at 207-208.*

Here, after a thorough investigation, counsel decided to present the testimony of several witnesses who focused upon appellant's admirable traits. This was not unreasonable, as has already been discussed (see also Point II, above), and it had the added benefit of

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the bracketed language.

not contradicting the defense evidence that was presented during the guilt phase. See Taylor v. State, 126 S.W.3d 755, 761-762 (Mo. banc 2004) (counsel reasonably chose to present mitigating evidence highlighting the defendant's troubled upbringing instead of evidence of extreme emotional disturbance at the time of the crime).

For example, appellant testified during the guilt phase that he did not threaten to kill the victim, that he had had his wages garnished before and was not particularly bothered by the deductions from his check (i.e., that this did not provoke him to kill), that he was shopping for a satellite television system before he went over to Terri Cole's residence (i.e., that he was engaged in normal behavior), that he only wanted to talk to Terri about seeing his children, that he did not intend to kill her, that he was not angry with Terri and had no intention of hurting her, that he tried to call Terri before going to the door of the house, that he never entered the house (except for placing one foot inside), that he was attacked and merely backed away and held off his attacker, that Terri was the person who was "upset" during that time period, and that he was only concerned about the welfare of his children (Tr. 1255-1256, 1260, 1263-1265, 1269, 1295, 1337-1338, 1342, 1361-1362, 1364, 1366). Appellant also presented the testimony of James Dawson, who confirmed that appellant had been shopping for a satellite television system that evening, and that appellant did not appear "out of the ordinary" or upset (Tr. 1393-1394, 1396).

Thus, if counsel had attempted to suggest to the jury in penalty phase that appellant had killed Anthony Curtis while under the influence of extreme emotional disturbance, it would have wholly contradicted appellant's contrary testimony during guilt phase, and it would have suggested to the jury that appellant was willing to attempt any maneuver without regard for the truth.[19] *And, accordingly,*

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[19] Appellant argues that evidence of extreme emotional disturbance was not inconsistent with his guilt-phase evidence because it could have been used to explain why he threw a jack through the door (App.Br. 91). However, explaining appellant's actions with regard to the jack would have been a meaningless gesture because, absent some concession that he actually killed

counsel was not ineffective for developing and using the mitigation theory that she ultimately used at trial. See Winfield v. State, 93 S.W.3d at 742 (the defendant's own testimony denying "that he was 'upset, confused or angry' during the moments leading up to and including the shootings" refuted his post-conviction claim that counsel should have presented evidence of extreme emotional disturbance).

In short, counsel made a reasonable decision to pursue one mitigation strategy to the exclusion of another. And, while it is possible that counsel could have reasonably made some alterations to that strategy (or perhaps even chosen a different strategy), and it cannot be said, under the circumstances here, that counsel's performance fell below an objective standard of reasonableness. This point should be denied.

C. Appellant was not Prejudiced

In addition to the foregoing, appellant was not prejudiced. The motion court stated:

> *Movant presented the report and testimony of Dr. William Logan, a psychiatrist retained in October of 2002, by previous post conviction counsel. Dr. Logan testified that he based his opinions on a four (4) hour interview of Movant and seventeen (17) volumes of records and interviews provided by Movant's counsel. He also*

Anthony Curtis, the existence of extreme emotional disturbance at the time of the crime did not tend to mitigate anything. Appellant acknowledges as much when he argues that he was prejudiced; he asserts: "There is more than a reasonable probability that the jurors would have concluded that **the stabbings** were not the result of a depraved mind, but the result of overwhelming emotional distress caused by [appellant's] failed marriage and being told that his children 'have a new daddy'" (App.Br. 94) (emphasis added). But, as discussed above, appellant never came close to conceding that he stabbed the victim.

indicated he conducted several telephone interviews of witnesses in November of 2003, eleven months after completing his report. Dr. Logan testified that he concurred with Drs. Scott and Armour that Movant was competent to stand trial and responsible for his conduct. Dr. Logan opined however, that Movant suffered from a mental disease or defect of major depressive disorder, which placed Movant under the influence of an extreme mental or emotional disturbance at the time of the crime.

* * *

The Court, having heard and considered all of Dr. Logan's testimony finds his opinions to lack the necessary evidence required to support his conclusions. Dr. Logan admitted that he based his opinions on Movant's interview as well as interviews with Movant's family and friends. Dr. Logan confessed that his entire source of materials for his testimony were litigation materials chosen and provided to him by Movant's counsel. Clearly, this testimony was biased towards the particular conclusion Movant's [post-conviction] counsel desired to reach. Dr. Logan conceded that many of the claims made by Movant in his interview were distorted, minimized, inconsistent and probably untrue. He agreed that Movant's current version of events differed greatly from his trial testimony and previous statements to Drs. Scott and Armour. Dr. Logan admitted that Movant, his family and friends have an incentive not to speak honestly about his participation in these crimes. He conceded that his report did not have balance by including any interviews with the victim, Terri Cole or her family or their description of the marital discord. Dr. Logan's testimony was rife with biased hearsay, inconsistent theories and was substantially discredited through cross-examination.

* * *

[Dr. Logan's] conclusions were unsupported by the records submitted or any credible evidence adduced. The only basis for his conclusions came from the limited materials Movant's counsel chose to expose. The testimony cannot

be considered reliable as it is not based upon any objective evidence. His testimony and status as an expert witness is rejected by this Court.

(PCR L.F. 464-467, 469). The motion court did not clearly err.

The key problem with Dr. Logan's opinion was that it was based to a large degree upon new information that he received from appellant and appellant's family and friends only ***after*** *appellant was convicted of murder in the first degree and sentenced to death (making their reports highly suspect). Of course, the existence of bias is always a potential problem and, ordinarily, the effect of such factors must be left to the jury to weigh. However, the problem in appellant's case went beyond the ordinary case of bias. As discussed above, appellant was examined by two experts* ***prior*** *to trial, and he testified at trial; thus, by the time he talked to Dr. Logan, appellant was already personally on record as to both his mental state at the time of the murder and his actions at the scene of the crime. And, as discussed above, appellant told Dr. Scott, Dr. Armour, and the jury that he was neither emotionally distraught and depressed at the time of the murder nor the perpetrator of the crime.*

But, when appellant spoke to Dr. Logan, his story changed. He reported, for example, that he was depressed immediately prior to the murder, and that he was having suicidal thoughts (PCR Tr. 141-142, 144-145; Mov.Ex. 2). As for the murder, appellant reported that he struggled with Anthony Curtis, that he received cuts to his leg, that he "panicked," and that he "snapped" and "lost it" (Mov.Ex. 2). He further reported that he had no recollection of what happened after he "lost it," but that after the struggle, he saw Terri Cole holding her breast and saying, "I have been cut" (Mov.Ex. 2). This, of course, was quite different from appellant's trial testimony, wherein appellant described being cut, holding off Anthony Curtis, seeing Terri Cole stab Curtis in the back (a reasonable inference from appellant's testimony), and seeing Curtis back Terri into the house as they swung at each other (Tr. 1269-1274).

As is evident, appellant's story altered considerably after he was convicted, apparently in an attempt to suggest that he might have committed the murder in a mentally deranged state. However, appellant ***never*** *told this story prior to trial, and, accordingly, there*

is no reason to believe that appellant would have told this story to Dr. Logan if Dr. Logan had been retained prior to trial.[20] *In any event, even assuming that appellant would have told this altered account to Dr. Logan prior to trial, there is no reasonable probability that the jury would have elected to credit an expert opinion based upon such a shaky foundation – especially in light of appellant's own sworn testimony, which was designed to prove that he was not emotionally distraught and that he did not kill Anthony Curtis.*[21]

Additionally, there is no reasonable probability that the jury would have credited Dr. Logan's conclusion that appellant was suffering from major depression, single episode (the basis for Dr. Logan's conclusion that appellant was under the influence of extreme emotional disturbance).[22] *Dr. Logan acknowledged that a diagnosis of major depression requires a major depressive episode, and he asserted that appellant's episode began sometime in early August 1998; however, he then admitted that appellant was reportedly functional – working and engaging in various activities – during that period, which was inconsistent with a diagnosis of major depression (PCR Tr. 241-246). He agreed that a diagnosis of major depression requires "major depressed mood for most of the day nearly every day" (PCR Tr. 246), but he failed to identify any such episode reported to him during the relevant time period. Along those same lines, Dr. Scott and Dr. Armour both testified that a major depressive episode must last for at least two weeks before a diagnosis of major depression*

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[20] Dr. Logan evaluated appellant about four years after the crime (PCR Tr. 161).

[21] And, of course, Dr. Logan's conclusions were also at odds with the conclusions of the first two experts who evaluated appellant, and who concluded (consistent with appellant's trial testimony and the defense theory) that appellant was not suffering from a mental disease or defect at the time of the crimes.

[22] It must be remembered, of course, that Dr. Logan's testimony only had value insofar as it tended to prove the existence of appellant's major depression and extreme emotional disturbance. His recitation of reported facts could not be considered for the truth of the matters asserted therein.

can be made (PCR Tr.II 89, 104-105).

In sum, in light of the plainly unreliable information that appellant provided to Dr. Logan (which contradicted the defense evidence presented at trial), and in light of the lack of evidence to support a diagnosis of major depression, the motion court did not clearly err in concluding that there was no reasonable probability that Dr. Logan's testimony would have affected the outcome of appellant's penalty phase. ***See generally Lyons v. State****, 39 S.W.3d at 37 (where evidence of deliberation was overwhelming, there was no reasonable probability that expert testimony regarding the defendant's alleged inability to deliberate affected the outcome of trial). This point should be denied.*

IV.

The motion court did not clearly err in denying, after an evidentiary hearing, appellant's claim that counsel was ineffective for failing to present additional evidence in penalty phase of appellant's mental condition at the time of the offenses, because counsel adequately investigated appellant's mental health (and developed a reasonable mitigation strategy), and appellant was not prejudiced.

Appellant contends that the motion court clearly erred in denying his claim that counsel was ineffective for failing to present additional evidence in penalty phase of his mental condition at the time of the offenses (App.Br. 95). Appellant claims that counsel should have called Pete Ruffino (a co-worker), James Dawson (a friend), Dr. Fred Duhart (the Cole family doctor), and Lillie Cole (appellant's mother) (App.Br. 95). These witnesses allegedly would have provided mitigating evidence to support a finding of extreme emotional distress – evidence which "would have given the jury an explanation as to why [appellant] threw the jack through Terri's patio door" (App.Br. 95, 103-104).

A. The Standard of Review

"Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." ***Moss v. State****, 10 S.W.3d 508, 511 (Mo. banc 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made."* ***Id****. "The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Supreme Court Rule 29.15(i).*

B. Counsel Adequately Investigated Appellant's Life History and Developed a Reasonable Mitigation Strategy

To prevail on a claim of ineffective assistance of counsel, appellant must "show that counsel's representation fell below an

objective standard of reasonableness." Strickland v. Washington, *466 U.S. 668, 687-688 (1984). Appellant must also show prejudice – that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."* Id. *at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome."* Id.

"The attorney's conduct must be so egregious that it undermines the proper functioning of the adversarial process to such an extent that the original trial cannot be relied on as producing a just result." Clayton v. State, *63 S.W.3d 201, 206 (Mo. banc 2001). If the appellant fails to show either deficient performance or prejudice, the court need not address the other component.* State v. Allen, *954 S.W.2d 414, 417 (Mo.App. E.D. 1997).*

In denying this claim, the motion court stated:

> *The claims raised in paragraphs 8(D) and 9(D) aver ineffective assistance of trial counsel for failing to present Movant's life history to the jury specifically by presenting evidence that: "(1) alcoholism, drug abuse and aggressive behavior are part of Andre's family history; (2) dysfunctional family traits are part of Andre's history; (3) depression and mental illness are part of Andre's family history; and (4) Andre experienced a marked increase in stress and build-up of tension just prior to the incident." Missouri law does not impose on trial counsel an absolute duty to present mitigating character evidence during the penalty phase of trial.* Schneider v. State, *787 S.W.2d 718, 721 (Mo. banc 1990),* cert. denied *498 U.S. 882, 112 L.Ed. 186, 111 S.Ct. 231 (1990);* Jones v. State, *767 S.W.2d 41, 43 (Mo. banc 1989),* cert. denied *493 U.S. 874, 107 L.Ed.2d 160, 110 S.Ct. 207 (1990). Trial counsel has a duty to make reasonable investigation of possible mitigating evidence.*
>
> *This Court finds that trial counsel met her obligation to investigate possible mitigating circumstances. Movant's trial counsel presented evidence she believed based on her extensive trial experience would be most beneficial to Movant. As discussed in paragraph 2 above [the findings and conclusions discussed in Point III], trial counsel's strategy was to "humanize" Movant in the penalty phase through favorable witnesses to his character and*

life. Trial counsel testified that she interviewed every witness given to her by Movant or his family and presented those who would testify favorably. The reasonable investigation by trial counsel conducted in this case did not disclose any of the information alleged by Movant. This Court is unable to determine if this was due to lack of cooperation on the part of Movant and his family with trial counsel or whether the alternative information was only offered when the trial strategy did not result in a lesser sentence. To portray Movant and his family in such a poor manner to the jury as suggested by amended motion counsel would be inconsistent when Movant's defense at trial was that he did not commit the murderous acts alleged. Trial counsel's strategy designed to convince the jury that they should rise above the horrible crime in this case and not execute a good man was reasonable and constituted sound trial strategy. This claim is denied.

(PCR L.F. 471-472). The motion court did not clearly err.

With regard to appellant's mental condition at the time of the offenses, the record shows that counsel conducted an adequate investigation. As outlined in Point III, above, counsel requested and obtained two mental evaluations of appellant (L.F. 3, 6; Resp.Exs. A-C). The first expert, Dr. Scott, concluded that, at the time of the offense, appellant was not suffering from a mental disease or defect (Resp.Ex. B). He also reported:

[Appellant] knew of no problems with his birth and early development. He denied early medical problems. The defendant described his family life as "pleasant and comfortable, like a family." His family was involved with the church and he felt close to his parents. He reported that his parents were not overly strict and he denied a history of physical abuse, acknowledging that he was hit with a belt when he was in trouble.

* * *

The defendant's medical history is generally unremarkable.

* * *

The defendant denied any history of psychiatric treatment.

* * *

The defendant denied a history of alcohol or drug problems. He stated that he has used alcohol periodically. He used marijuana one time in his life. He reported that he has used no other illicit drugs. The defendant described his pattern of drinking by saying that he only drinks on weekends or his day off. He stated that he does not drink to intoxication. When asked if he ever drank on a daily basis, he admitted that he would sometimes drink other days besides weekends. He denied others seeing him as having an alcohol problem. In contrast, the defendant's ex-wife stated that he has had significant problems due to alcohol. He has become verbally aggressive and hostile when drunk. At least one police report indicated that he was under the influence of alcohol at the time he was arrested by police.

(Resp.Ex. A). Additionally, in evaluating appellant's mental condition at the time of the crimes, Dr. Scott made several significant observations, including:

(1) that appellant said, regarding his life at the time of the crime, "Actually, my life was going fine. That's true. My life was going fine;"

(2) that appellant denied any alcohol or drug use during that time period, including the use of prescription medication;

(3) that appellant reported that he had never required psychiatric treatment;

(4) that appellant said he went to Terri Cole's residence to see his children, and that appellant "described no unusual ideas or beliefs, or confusion regarding his purpose for going to the home;"

(5) that there was no information suggesting that appellant had "ever suffered a head injury or other organic impairment that would cause a cognitive disorder;"

(6) that, according to employment records and interviews of co-workers, appellant "conducted his routine activities without

obvious impairment in the week prior to the alleged offense;"

(7) that appellant's reported actions during the attack suggested that he was "capable of interpreting his circumstances and redirecting his actions as needed to accomplish his goal;"

(8) that appellant's use of a tire iron in breaking into the house, a method he had used on a previous occasion, suggested a "consistency in the method of operation;"

(9) that "[n]o statements suggested that [appellant] was unable to direct his behavior, was speaking as though he did not make sense, or otherwise was behaving in a manner suggesting he was suffering severe impairment in his emotional or cognitive abilities;" and

(10) that appellant's "description of the events surrounding the alleged offense suggests a rational motive for going to the home and no sign of psychological or emotional problems at the time of the alleged offense."

(Resp.Ex. B) (emphasis added).

Likewise, Dr. Armour also concluded that appellant did not suffer from a mental disease or defect at the time of the crime (Resp.Ex. C). And, with regard to appellant's history, he reported:

When asked about any family history of psychiatric problems, substance abuse problems or legal problems, [appellant] stated that he did not know of any psychiatric problems, alcohol or other substance abuse problems, or legal problems within the immediate or extended family.

* * *

When asked about his use of alcohol and other drugs, [appellant] stated that he had his first drink of alcohol at age 18 and first became intoxicated on alcohol at age 23. He described himself as being primarily a "weekend drinker." When asked about symptoms indicative of alcohol about [sic] and dependence, he denied

experiencing memory lapses or "blackouts," episodes of morning drinking to control the effects of hangover and withdrawal, binge drinking, or tremors due to withdrawal. He stated that he was cited for a DWI one time but that this was changed to a moving violation and that it is not on his record as a DWI. When asked about his use of other drugs, he reported using marijuana "one to two times" but that he did not like the effect of this drug. He denied use of or experimentation with other drugs, including powder cocaine, "crack" cocaine, "speed," "crystal meth," or any opiates. He also denied any IV substance use. [Appellant] stated that he has not been in any formal chemical dependency treatment or participated in any 12-step self-help programs. He stated that he had to go to a "DWI school" for two days over a weekend.

When asked about his physical health, [appellant] reported that his physical health is "pretty good." . . . He denied ever suffering any seizures.

* * *

When asked about his contact with mental health professionals, [appellant] reported that he has not have any prior contact with any mental health professionals on either an inpatient or outpatient basis.

* * *

No evidence came to light during this evaluation that Mr. Cole has suffered from a serious mental disorder, with the exception of Alcohol Abuse, prior to or during the alleged offense. Mr. Cole denies experiencing symptoms of paranoia or other delusional beliefs, or hallucinations prior to or during the time period surrounding the alleged offense. His thought process are logical and sequential, with no indication of a formal thought disorder. His history is negative for treatment for a mental disorder by any mental health professional on either an inpatient or outpatient basis.

(Resp.Ex. C).

In addition to obtaining these evaluations, counsel testified at the evidentiary hearing that she did not observe or discover any evidence suggesting that appellant was depressed or otherwise suffering from a mental disease or defect at the time of the offense (PCR Tr. 429). She also testified that she spoke with appellant, appellant's mother and appellant's sister on a routine basis, and that she interviewed approximately twenty-five other witnesses provided by appellant and his family, and that nobody ever mentioned depression, mental illness, or any history of mental illness, alcoholism or medical problems in the family (PCR Tr. 372, 426-429, 433-434, 437-441, 459-466, 439). Counsel testified specifically that she asked appellant, his mother and his sister whether there was any history of mental problems, but that none of them mentioned any significant mental- or medical-health history (PCR Tr. 426-427, 429, 436-437, 440-441, 459-466, 469).[23]

All of this gave counsel a sufficient basis to conclude that her efforts would be better spent looking for other types of mitigating evidence. In other words, counsel's investigation of appellant's mental state at the time of the crime was in no way deficient. "What investigation decisions are reasonable depends 'critically' on what information the defendant has supplied his lawyer." ***Ervin v. State****, 80 S.W.3d 817, 824 (Mo. banc 2002) (quoting* ***Strickland****, 466 U.S. at 691). "And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."* ***Id.***

Here, despite numerous conversations and contacts, appellant and his family members – those who were in the best position to know appellant's history (and family history) – never divulged any pertinent information to defense counsel when asked if there was

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[23] Indeed, the only depression counsel noted was appellant's post-arrest depression in jail; however, she saw no signs of clinical depression (a conclusion that was completely backed up by the two expert evaluations performed by Drs. Scott and Armour) (PCR Tr. 441, 459-461; Resp.Exs. A-C).

any personal or family history of mental or medical problems. Accordingly, counsel cannot be blamed for failing to discover and present additional evidence of appellant's mental condition. See Lyons v. State, 39 S.W.3d 32, 41 (Mo. banc 2001) (where counsel has conducted a reasonable investigation, "counsel cannot be deemed ineffective for failing to discover evidence . . . that appellant's family did not share with them during the investigation.").

This is particularly true with regard to appellant's mother, Lillie Cole, who was specifically questioned on the issue, but it is also true with regard to the other witnesses. For when appellant and his family failed to provide information upon questioning, counsel understandably curtailed her efforts in this area. Counsel had no reason to suspect a history of mental or medical problems (and certainly no reason to believe that people outside the family would have information that the family did not have); and, consequently, it was reasonable for counsel to eventually conclude her investigation in this area.

Additionally, to the extent that counsel chose not to expend further effort in looking for evidence of appellant's mental condition, counsel's decision was both reasonable (in light of the mitigation theory used at trial) and consistent with the defense evidence that had been presented during the guilt phase (which plainly showed that appellant did not commit the murder and that appellant was not under the influence of extreme emotion disturbance on the night of the murder) (see Tr. 1255-1256, 1260, 1263-1265, 1269, 1295, 1337-1338, 1342, 1361-1362, 1364, 1366, 1393-1394, 1396).

As discussed in point III, above, appellant testified during the guilt phase that he did not threaten to kill the victim, that he had had his wages garnished before and was not particularly bothered by the deductions from his check (i.e., that this did not provoke him to kill),[24] that he was shopping for a satellite television system before he went over to Terri Cole's residence (i.e., that he was engaged

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[24] In light of this testimony, it makes sense that, in the penalty phase, counsel would avoid eliciting evidence like the testimony offered by Peter Ruffino at the evidentiary hearing. Ruffino testified that appellant was depressed and very angry about paying child support, and

in normal behavior), that he only wanted to talk to Terri about seeing his children, that he did not intend to kill her, that he was not angry with Terri and had no intention of hurting her, that he tried to call Terri before going to the door of the house, that he never entered the house (except for placing one foot inside), that he was attacked and merely backed away and held off his attacker, that Terri was the person who was "upset" during that time period, and that he was only concerned about the welfare of his children (Tr. 1255-1256, 1260, 1263-1265, 1269, 1295, 1337-1338, 1342, 1361-1362, 1364, 1366). Also during the guilt phase, appellant presented the testimony of James Dawson, who confirmed that appellant had been shopping for a satellite television system that evening, and that appellant did not appear "out of the ordinary" or upset (Tr. 1393-1394, 1396).

Thus, if counsel had attempted to suggest to the jury in penalty phase that appellant had killed Anthony Curtis while under the influence of extreme emotional disturbance, it would have wholly contradicted appellant's trial testimony (and suggested to the jury that appellant, when faced with a possible sentence of death, was willing to attempt any maneuver without regard for the truth). Such evidence ran the risk of alienating the jury.

As in Point III, appellant argues that evidence of extreme emotional disturbance could have been used to explain why he threw

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that appellant threatened to kill Terri Cole before he would give her another dime (PCR Tr. 9-10, 16). This testimony was very similar to the testimony that Ruffino offered in the state's case in chief (Tr. 871-872), it contradicted appellant's trial testimony, and it did little or nothing to mitigate appellant's culpability. It is notable that on cross-examination of Ruffino at trial, defense counsel elicited that appellant was a good worker, that Ruffino never had any trouble with appellant, and that Ruffino had talked to appellant about appellant's children (Tr. 873-874, 876). This, too, was consistent with the overall theory that defense counsel had prepared for trial.

a jack through the door (App.Br. 91). But, as noted above, explaining appellant's actions with the jack would have been fruitless absent some concession that he actually killed Anthony Curtis. Appellant acknowledges this by suggesting that counsel should have conceded appellant's role in the murder and relied upon evidence of extreme emotional disturbance to convince the jury that appellant had "succumb[ed] to the passions or frailties inherent in the human condition" (App.Br. 103-104, citing Cheshire v. State*, 568 So.2d 908, 911-912 (Fla. 1990)). But, again, appellant never made such a concession, and such a concession would have wholly contradicted appellant's testimony at the risk of alienating the jury.*

Additionally, "[w]here trial counsel reasonably decides as a matter of trial strategy to pursue one evidentiary course to the exclusion of another, trial counsel's informed, strategic decisions not to offer certain evidence is not ineffective assistance." State v. Johnston*, 957 S.W.2d 734, 755-756 (Mo. banc 1997). Indeed, as this Court has stated: "It is not ineffective assistance of counsel for an attorney to pursue one reasonable trial strategy to the exclusion of another, even if the latter would also be a reasonable strategy."* Clayton v. State*, 63 S.W.3d at 207-208.*

In the case at bar, counsel testified at the evidentiary hearing that she ultimately decided on a mitigation theory of presenting good character evidence and trying to humanize appellant (PCR Tr. 374, 481). To that end, appellant's mother testified that appellant was dependable, that he helped people, and that he was a peacemaker (Tr. 1596-1597). She further testified that appellant was a Christian, that he attended church, and that he had been raised in the church (Tr. 1597). Appellant's sister testified that appellant was a helpful person who went out of his way to help others (Tr. 1601). Appellant's cousin testified that appellant was dependable (Tr. 1603). One of appellant's good friends testified that appellant had strong values and morals, that appellant attended church, and that appellant was clean cut (Tr. 1607). Another of appellant's friends also testified that appellant was willing to help and supportive in times of need (Tr. 1627). Appellant's pastor confirmed that appellant attended church on a regular basis, that appellant was a warm and compassionate person, and that appellant always got along with others (Tr. 1610-1611).

A friend of the family testified that appellant helped his mother, that appellant was kind, and that he was always willing to help

(Tr. 1613). Another friend of the family confirmed that appellant attended church, and that after high school appellant got a job and was 'willing to go to work and work everyday" (Tr. 1615-1616). One of appellant's father's friends testified that he got appellant a job at the St. Louis Zoo, and that appellant was a "perfect" employee who was always there and always on time (Tr. 1618). He further testified that appellant was always respectful, a hard worker and a quick learner, and that he was remembered at the zoo as one of their best employees (Tr. 1619-1620). Another of appellant's father's friends confirmed that appellant was respectful, and that appellant attended church (Tr. 1624).[25]

Additionally, rather than presenting evidence of rampant mental illness and substance abuse in appellant's family (evidence that counsel did not have), counsel presented evidence of the strong family and social ties that appellant enjoyed. Appellant's mother testified that appellant checked on her daily after his father died, fulfilling a promise that appellant had made to his father (Tr. 1596). Appellant's sister testified that appellant was a good brother, and that she had always enjoyed a good relationship with him (Tr. 1600-1601). One of appellant's close friends testified that appellant's family, like his own, had "strong values, morals" (Tr. 1607). And, lastly, each of appellant's witnesses described what kind of impact losing appellant would have on his or her life (Tr. 1598-1599, 1601-1602, 1604, 1608, 1611, 1614, 1616, 1621, 1625, 1627).

All of this evidence was designed to show the jurors the value of appellant's life and to provide a reason for them to mete out

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[25] In light of the nature of all of this evidence, it makes perfect sense that counsel would avoid, for example, James Dawson's testimony that appellant was a troubled drinker who was "looking for answers . . . at the bottom of a beer can" (PCR L.F. 217). Incidentally, while appellant recites various other bits of testimony offered by Dawson at the evidentiary hearing, the only allegation in the amended motion was that Dawson would testify about appellant's "drinking" (PCR L.F. 217).

mercy. And, while evidence of appellant's poor mental condition might have been able to provide another reason to mitigate punishment, such evidence was largely inconsistent with the guilt- and penalty-phase evidence presented by the defense. Accordingly, counsel was not ineffective for developing and using the mitigation theory that she ultimately used at trial. ***See Taylor v. State****, 126 S.W.3d 755, 761-762 (Mo. banc 2004) (counsel reasonably chose to present mitigating evidence highlighting the defendant's troubled upbringing instead of evidence of extreme emotional disturbance at the time of the crime);* ***Winfield v. State****, 93 S.W.3d at 742 (the defendant's own testimony denying "that he was 'upset, confused or angry' during the moments leading up to and including the shootings" refuted his post-conviction claim that counsel should have presented evidence of extreme emotional disturbance).*

In short, counsel made a reasonable decision to pursue one mitigation strategy to the exclusion of another, and it cannot be said that counsel's performance fell below an objective standard of reasonableness. This point should be denied.

CONCLUSION

In view of the foregoing, respondent submits that the denial of appellant's Rule 29.15 motion should be affirmed.

Respectfully submitted,

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IN THE
MISSOURI SUPREME COURT

ANDRE V. COLE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of St. Louis County, Missouri
21st Judicial Circuit, Division 9
The Honorable David Lee Vincent, III, Judge

APPENDIX TO RESPONDENT'S BRIEF

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

(1) That the attached brief complies with the limitations contained in this Supreme Court Rule 84.06(b), and that the brief, excluding the cover, the certificate of service, this certificate, the signature block, and appendix, contains 21,731 words (as determined by WordPerfect 9 software);

(2) That the floppy disk filed with this brief, and containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) That two true and correct copies of the brief, and a copy of the floppy disk containing a copy of the brief, were mailed, postage prepaid, this _____ day of October, 2004, to:

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